Supreme Court, U.S.
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No. 09-____ 09-333 SEP 15 2009

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IN THE

Supreme Court of the United States

GUADALUPE L. GARCIA, JR., *ET AL.*,
Petitioners,

v.

THOMAS VILSACK, SECRETARY,
UNITED STATES DEPARTMENT OF AGRICULTURE,
Respondent.

ROSEMARY LOVE, *ET AL.*,
Petitioners,

v.

THOMAS VILSACK, SECRETARY,
UNITED STATES DEPARTMENT OF AGRICULTURE,
Respondent.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Administrative Procedure Act ("APA"), "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U. S. C. §704 ("§704" or "APA 704"). In *Bowen v. Massachusetts*, this Court held that §704 precludes APA review only where "*existing procedures* for review of agency action" were in place "*[a]t the time the APA was enacted . . . .*" 487 U. S. 879, 903 (1988) (emphasis added); *accord Darby v. Cisneros*, 509 U.S. 137, 146 (1993). But in this case the District of Columbia Circuit, as it has for years, relied instead on the contrary authority of its own pre-*Bowen* case, *Council of & for the Blind of Delaware County Valley, Inc. v. Regan*, 709 F. 2d 1521 (D.C. Cir. 1983) (*en banc*). Accordingly, the court of appeals affirmed the dismissal of petitioners' APA claims challenging unlawful acts by the United States Department of Agriculture ("USDA"), namely that USDA refused to process and investigate claims of discrimination against Hispanic farmers and women farmers. In the court's view, a statute passed long after the APA's enactment, section 741 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub L. No. 105-277, 112 Stat. 2681-31 ("§741") (codified at 7 U.S.C. §2279 note), constituted an "other adequate remedy in a court" as defined in 5 U.S.C. §704. The question presented is:

Whether a statute, such as §741, that was enacted subsequent to the passage of the APA and that does not expressly displace APA remedies,

precludes judicial review of unlawful agency action under the APA?

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RULE 26.6 STATEMENT

None of the petitioners has a parent company or is a publicly held company.

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§§14011-14012 of the Food, Conservation and Energy Act of 2008, Pub. L. 110-246, 122 Stat. 1651 ("2008 Farm Bill") 20

Equal Credit Opportunity Act, 15 U.S.C. §§1691 *et seq* 2

RULES

Fed. R. Civ. P. 23(b)(2) 7

Fed. R. Civ. P. 23(f) 7

S. Ct. Rule 10 9

PETITION FOR A WRIT OF CERTIORARI

Petitioners Guadalupe L. Garcia, Jr., G.A. Garcia and Sons Farm, Tony and Patricia Jimenez, Edward and Norma Flores, Gloria Moralez, Beatrice and Rodolfo Garza, Larry and Robert Chavarria, Rigoberto Banuelos, Modesto Rodriguez, Ruperto R. Rodriguez, Modesta Salazar, Rodriguez Brothers, Inc., on behalf of themselves and similarly situated individuals and entities ("the *Garcia* petitioners"), and Rosemary Love, on behalf of herself and similarly situated individuals and entities ("the *Love* petitioners"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-20a) is reported at 563 F.3d 519. The opinion of the district court denying petitioners' claims based upon the Department of Agriculture's refusal to process and investigate their discrimination complaints is reported at 525 F. Supp. 2d 155 (App. 25a-39a). Prior decisions of the court of appeals are reported at 444 F.3d 625 (App. 40a-67a) and 439 F.3d 723 (App. 68a-92a); and prior decisions of the district court are reported at 2002 WL 33004124 (App. 93a-99a), 211 F.R.D. 15 (App. 100a-127a), 224 F.R.D. 8 and 224 F.R.D. 240 (App. 128a-173a).

JURISDICTION

The judgment of the court of appeals was entered on April 24, 2009 (App. 20a-22a). Timely petitions for rehearing were denied on June 18, 2009 (App. 23a-24a). This Court's jurisdiction is invoked under 28 U.S.C. §1254(7).

STATUTORY PROVISIONS INVOLVED

The relevant sections of the Administrative Procedure Act, 5 U.S.C. §559, §704, and §741 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681-31 (codified as 7 U.S.C. §2279 note); and the Equal Credit Opportunity Act, 15 U.S.C. §§1691 *et seq.* are set forth at Appendix 174a-185a.

STATEMENT OF THE CASE

This case presents important issues of administrative law arising from shameful agency misconduct: the surreptitious dismantling by the USDA of its civil rights enforcement capability. It is undisputed in this case that USDA denied minority farmers equal access to both farm credit and non-credit benefit programs. It is also undisputed that, in the 1980s, USDA secretly shut down its entire enforcement operation without informing Congress or the minority farmers who were adversely affected by the agency's pervasive, longstanding discriminatory practices. Unbeknownst to farmers who complained of the agency's unlawful actions, USDA conducted no investigations and undertook no

remedial steps whatsoever. Accordingly, it is also undisputed that contrary to law, and to its own regulations, USDA's pretense of civil rights enforcement was a complete sham.. It still is.

In all of American history there have been few episodes of such odious governmental lawlessness. In prior situations, the courts correctly perceived that Congress had provided a judicial forum for redress. But in this case, the court of appeals denied a judicial forum for petitioners' failure-to-investigate claims, holding that petitioners must instead pursue the very administrative processes that USDA dismantled and that simply do not exist.

This Court's review is warranted for multiple compelling reasons. First, the case presents a vitally important and frequently recurring question under §10c of the APA, 5 U.S.C. §704 (hereinafter, "§704"). Contrary to this Court's authoritative interpretation of §704 in *Bowen v. Massachusetts,* 487 U.S. 879 (1988), the court of appeals clings to an irreconcilable, and erroneously broad, pre-*Bowen* view it articulated in *Council of & for the Blind of Delaware County Valley, Inc. v. Regan*, 709 F.2d 1521 (D.C. Cir. 1983) (*en banc*).

Second, the erroneous legal pronouncements on which the judgment below are based take on added significance because of the central role the D.C. Circuit plays in the development of administrative law. With a docket heavily laden with appeals from agency decisions, the D.C. Circuit's interpretation of §704 reverberates nationwide with exceptional force. This Court

should, accordingly, be vigilant to ensure that the D.C. Circuit's repeated departures from *Bowen* not go uncorrected.

Third, this case is particularly worthy of review because the federal courts themselves have played an extraordinary role in isolating the specific minority groups that will bear the entire brunt of this governmental discrimination and of this total breakdown of agency process. Although all minority groups suffered USDA's well-documented discriminatory actions, only Hispanic farmers and women farmers – the petitioners in this case – have been denied a judicial forum to pursue class-wide relief. In contrast, identical cases brought by African-American and Native American farmers were permitted to proceed as class actions on the basis of USDA's admitted failure to investigate their discrimination complaints and, in the case of African American farmers, resulted in a redress of grievances.

For years, the USDA has denied minority farmers equal access to farm credit in violation of ECOA, and non-credit benefit programs in violation of the APA, while urging farmers to complain to USDA of such discrimination. In the early 1980s, USDA secretly dismantled its civil rights enforcement capability, making any pretense of civil rights enforcement by USDA a total sham. Thereafter, USDA, in contravention of its own regulations, refused and still refuses to investigate their complaints. Secretary Glickman, the original defendant in these cases, testified before Congress that USDA had a "long history" of unlawful

discrimination against minority farmers and that "[g]ood people lost their family land . . . because of the color of their skin." (App. 188a). Similarly, Rosalind Gray, the former director of the USDA Office of Civil Rights, testified that "the systemic exclusion of minority farmers remains the standard operating procedure of FSA [Farm Service Agency]," the USDA agency that administers farm credit and non-credit farm benefit programs. (App. 215a, ¶ 28).

Upon learning that USDA had secretly dismantled its civil right enforcement capability, Congress enacted §741 (part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999), which waived the statute of limitations for farmers who filed complaints with USDA "before July 1, 1997 . . . alleg[ing] discrimination at any time . . . [from] January 1, 1981 . . . [through] December 31, 1996," (App. 177a-179a), and permitted them to file civil actions directly in court (7 U.S.C. §2279 note) or to pursue an *optional* administrative process. *See* §741 (b) ("The complainant *may*, in lieu of filing a civil action seek a determination on the merits of the eligible complaint by the [USDA] . . . .") (emphasis added) (App. 177a). Senator Robb, the principal sponsor of the provision, explained the need for the waiver:

> [T]he investigative unit at USDA's [OCR] was abolished in 1983. Farmers whose complaints were pending at the time were led to believe their complaints were still being investigated, when they were not. Farmers who filed

> the complaints [there]after ...were also led to believe that their complaints would be...investigated, despite the fact that USDA had no resources with which to conduct such investigations....[N]one of these complaints were ever considered – but none of the farmers were told that was the case.

(App. 223a-224a). Despite the passage of §741, USDA has not only refused to investigate minority farmers' discrimination complaints, but has taken steps to thwart Congress' efforts to address discrimination in the farm programs. (App. 235a-237a).

Eventually, African-American, Hispanic, Native-American and women farmers filed virtually identical suits in the United States District Court for the District of Columbia to remedy USDA's unlawful discrimination.[1] Just like the African-American farmers (in *Pigford*) and the Native-American farmers (in *Keepseagle*), the Hispanic and women farmers in this case allege that USDA discriminates against them in the administration of its farm credit programs, in violation of ECOA, and non-credit benefit programs, in violation of the APA. They

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[1] *Pigford v. Glickman*, 185 F. R. D. 82 (D.D.C. 1999) (Friedman, J.) (African-American farmers); *Keepseagle v. Veneman*, No. 99-3119 (EGS), 2001 U.S. Dist. LEXIS 25220 (D.D.C. Dec. 12, 2001) (Sullivan, J.) (Native-American farmers); *Garcia v. Veneman*, 224 F. R. D. 8 (D.D.C. 2004) (Robertson, J.) (Hispanic farmers); *Love v. Veneman*, 224 F. R. D. 240 (D.D.C. 2004) (Robertson, J.) (women farmers).

further allege that when they complain of discrimination in those programs, USDA refuses to investigate their complaints, in violation of the APA. The district court certified classes in the African American and Native American cases on the basis of USDA's admitted failure to investigate the discrimination complaints of African American and Native American farmers and, with the approval of the D.C. Circuit, those cases proceeded.[2] In the Hispanic and women farmers' cases, however, Judge Robertson ruled that such allegations do not state a cause of action under ECOA or the APA and hence refused to certify those cases as class actions. (App. 93a-99a). In earlier appeals, the D.C. Circuit

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[2] *Pigford v. Glickman*, 206 F. 3d 1212 (D.C. Cir. 2000) (approving consent decree); *Pigford v. Veneman*, 355 F. Supp. 2d 148, 151 (D.D.C. 2005); *Pigford v. Glickman*, 182 F.R.D. 341, 343 (D.D.C. 1998) (certifying class to pursue claims that "USDA failed properly to investigate those complaints" of discrimination in farm credit and non-credit farm benefit programs). In *Keepseagle*, Judge Sullivan certified a class pursuant to Fed. R. Civ. P. 23(b)(2) noting that "the systematic failure to process complaints of discrimination is a unifying characteristic of the class and raises common questions of fact and law." *Keepseagle*, 2001 U.S. Dist. LEXIS 25220, at *29; *accord Pigford*, 182 F.R.D. at 348-49. In dismissing the government's Fed. R. Civ. P. 23(f) petition, the D.C. Circuit held that it did not "see anything either novel or manifestly erroneous . . . about the district court's conclusion that the farmers' allegations concerning . . . [USDA's] 'failure to . . . investigate discrimination complaints,' which 'affected each class member,' satisfy Rule 23(a)'s commonality and typicality requirements." *In re Veneman*, 309 F. 3d 789, 794 (D.C. Cir. 2002); *see also In re Veneman*, No. 04-5031, 2004 U.S. App. LEXIS 4219 (D.C. Cir. Mar. 3, 2004) (denying petition for a writ of mandamus).

affirmed the district court's dismissals in the *Garcia* and *Love* cases of petitioners' failure-to-investigate claims based on ECOA and remanded for further development of those same claims based upon the APA. *Garcia v. Johanns*, 444 F.3d 625, 637 (D.C. Cir. 2006) (App. 40a-67a); *Love v. Johanns*, 439 F. 3d 723 (D.C. Cir. 2006) (App. 68a-92a). On remand, the district court reaffirmed its dismissals of the APA failure-to-investigate claims in a single opinion applicable to both the *Garcia* and *Love* cases. *See Love v. Connor*, 525 F. Supp. 2d 155 (D.D.C. 2007). (App. 25a-39a).

The D.C. Circuit affirmed. (App. 1a-22a). In so ruling, the court of appeals acknowledged that "[i]n *Bowen* . . . the Supreme Court interpreted §704 as precluding APA review where Congress has otherwise provided a 'special and adequate review procedure.'" 563 F.3d at 522 (quoting *Bowen*, 487 U.S. at 904) (App. 9a). Significantly, however, the court of appeals, in following its holding in *Council of & for the Blind*, selectively quoted from *Bowen* and ignored *Bowen*'s explicit definition of "'the special and adequate review procedure'" that would preclude judicial review under APA §704. The D.C. Circuit concluded that §741, which extended the applicable statutes of limitations and purported to give aggrieved farmers the option of filing suit in district court or resubmitting their complaints to USDA, and more generally ECOA provided the "special and adequate" review procedures that *Bowen* held would preclude an APA claim. 563 F.3d at 522 (App. 7a-10a). The D.C. Circuit also faulted plaintiffs, some of whom had waited for nearly twenty years to have

their complaints heard, for not attempting to use §741's optional administrative process despite what the court conceded was unrebutted evidence that USDA had sabotaged the process, thus making its use utterly futile. *Id.* at 524 & n.5 (App. 13a). According to the D.C. Circuit, because at some indeterminate point years in the future judicial review might be available, the utterly futile optional administrative process constitutes an "adequate remedy in a court" within the meaning of §704. *Id.* at 524 (App. 13a).

REASONS FOR GRANTING THE PETITION

Throughout our history, the courts have fulfilled the honored role of ensuring that the government complies with Constitutional standards and with governing legal norms. Especially in those instances – fortunately very few – when other branches of the federal government have suffered a total breakdown of adherence to the law, the judiciary has been a beacon of rectitude. But in this case, the lower courts have failed. Indeed, they have exacerbated the underlying problem through the selective provision of remedies – for the same discriminatory conduct – to some minority groups, but not to others. Accordingly, this case would warrant review even if it lacked other traditional indicia of worthiness for certiorari. S. Ct. Rule 10.

But there is no paucity of Rule 10 justifications for review. In denying petitioners a judicial forum for their failure-to-investigate claims, the D.C. Circuit misconstrued §704, contrary to this Court's authoritative interpretation of that section

in *Bowen*. Rather than conform to this Court's reading of the statute, the D.C. Circuit relied instead on its own pre-*Bowen* precedent. The D.C. Circuit's indefensible antipathy to *Bowen* is deeply engrained. For years, that court has preferred to hearken back to the standards it created prior to *Bowen*. There is, accordingly, ample reason for this Court to step in now and assure that §704 is correctly interpreted to provide the judicial forum for review of agency lawlessness that Congress plainly intended.

I. THE PANEL'S CONSTRUCTION OF APA §704 CONFLICTS WITH THIS COURT'S AUTHORITATIVE CONSTRUCTION.

A. *Bowen* Narrowly Defined §704 To Avoid Duplication Of Review Procedures Existing When The APA Was Enacted.

Section 704 provides, in relevant part, that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review." In *Bowen*, this Court made clear that the statute's "'other adequate remedy in any court'" language was intended merely to make certain that the APA would not provide additional judicial review of agency actions in those circumstances where Congress had already enacted special administrative review provisions for specific agencies prior to the APA's enactment. 487 U.S. at 901-02 n.32 (quoting 5 U.S.C. §704). Five years later, this Court expressly reiterated its construction of §704, stating that "*Congress intended by that provision simply to avoid*

duplicating previously established special statutory procedures for review of agency actions." *Darby v. Cisneros*, 509 U.S. 137, 146 (1993) (emphasis added).

In *Bowen*, this Court also held that "[t]he exception that was intended to avoid such duplication should not be construed to defeat *the central purpose of providing a broad spectrum of judicial review of agency action.*" 487 U.S. at 903-04 (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 140-41 (1967)) (emphasis added). As the Court, quoting §704, explained, "'[t]he legislative material elucidating that seminal act manifests a congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the [APA's] 'generous review provisions' must be given a 'hospitable' interpretation.'" *Bowen*, 487 U.S. at 903-04 (quoting *Abbot Labs.*, 387 U.S. at 140-41). Under the standard this Court has articulated, petitioners failure-to-investigate claims surely should have been permitted to proceed. In contrast to this Court's instruction, the D.C. Circuit has been incorrectly restrictive in affording judicial review of agency decisions under §704.

B. The Court of Appeals' Relied On A Construction Of §704 That Predates And Contradicts This Court's Construction Of That Section in *Bowen*.

Given this Court's clear guidance, there is no valid justification for the D.C. Circuit's longstanding, and continuing, preference for its own pre-*Bowen*

decision. The opinion in this case is an unfortunately typical example of the D.C. Circuit's elevation of its older precedent over this Court's governing standards. In the decision below, the court of appeals relied principally on *Council of & for the Blind* and its progeny. But the D.C. Circuit decided *Council of & for the Blind* five years before this Court's decision in *Bowen*. And, with just one exception, none of the post-*Bowen* circuit opinions dealing with §704 upon which the decision below relied even cites *Bowen*. This persistent avoidance of *Bowen* is as inexplicable as it is incorrect.

Of the §704 cases that the opinion below cites, the only one that even mentions *Bowen* is *El Rio Santa Cruz Neighborhood Health Center v. HHS*, 396 F.3d 1265 (D.C. Cir. 2005) ("*El Rio Santa Cruz*"). And, contrary to the *ipse dixit* in the decision below, *El Rio Santa Cruz* is not "consistent with the Supreme Court's construction of the APA in *Bowen*" (563 F.3d at 525). For example, the D.C. Circuit opinion in *El Rio Santa Cruz* states (396 F.3d at 1270 (citations omitted)):

> In *Bowen* . . . the Supreme Court addressed the meaning of "adequate remedy" under § 704 of the APA. While observing that § 704 was not intended to provide additional judicial remedies "where the Congress has provided special and adequate review procedures," the Court explained that "the exception that was intended to avoid such duplication should not be construed to defeat the central purpose

> of providing a broad spectrum of judicial review of agency action." In that case, the Court concluded that relief in the Claims Court "is plainly not the kind of 'special and adequate review procedure' that will oust a district court of its normal jurisdiction under the APA."

But the full quote from *Bowen* is as follows:

> However, although the primary thrust of § 704 was to codify the exhaustion requirement, the provision as enacted also makes it clear that Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action. As Attorney General Clark put it the following year, § 704 "does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures." At the time the APA was enacted, a number of statutes creating administrative agencies defined the specific procedures to be followed in reviewing a particular agency's action; for example, Federal Trade Commission and National Labor Relations Board orders were directly reviewable in the regional courts of appeals, and Interstate Commerce Commission orders were subject to review in specially constituted three-judge district courts. When Congress enacted the

> APA to provide a general authorization for review of agency action in the district courts, it did not intend that general grant of jurisdiction to duplicate the previously established special statutory procedures relating to specific agencies.

487 U.S. at 903 (emphasis added; footnotes omitted). In proper context, the full quote from *Bowen* leaves no doubt whatsoever about the "special and adequate review procedures" that this Court held would bar review under §704. Significantly, this Court's explicit description of those "special and adequate review procedures" is completely missing from the D.C. Circuit's discussion in *El Rio Santa Cruz*. By truncating the quote, the D.C. Circuit removed the express temporal limitations that this Court placed upon its interpretation of §704, which precluded APA review only where there were "*existing procedures for review of agency action*" in place "*[a]t the time the APA was enacted. . . .*" *Bowen*, 487 U.S. at 903 (emphasis added).

This Court's authoritative construction of the statute is plainly correct and is further reinforced by comparing the separate sections of the APA dealing with pre-existing and later-enacted statutory remedies (APA §§10(c) and 12). As this Court made clear in *Bowen*, the relevant portion of §704 was contained in §10(c) of the APA and addressed statutory review procedures that existed at the time Congress enacted the APA. By contrast, the effect on the APA of future legislation was addressed in §12: "'[N]o subsequent legislation shall be held to

supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly.'" *Shaughnessy v. Pedreiro*, 349 U.S. 48, 50-51 (1955) (quoting §12); *see* 5 U.S.C. §559 (App. 174a-175a). In short, for §704 purposes, legislation passed after the APA was enacted must be assessed differently from legislation pre-dating the APA.

But in *El Rio Santa Cruz* the D.C. Circuit expressly acknowledged that in a series of cases beginning with *Council of & for the Blind* its §704 analysis focused simply on "whether a statute provides an independent cause of action or an alternative review procedure," *El Rio Santa Cruz*, 396 F.3d at 1270 (citing cases), regardless of when enacted rather than following this Court's careful definition limited to "previously established special statutory procedures relating to specific agencies" that were "existing . . . [a]t the time the APA was enacted." *Bowen*, 487 U.S. at 903; *see also El Rio Santa Cruz*, 396 F.3d at 1271 (recognizing that although the D.C. Circuit had "originally defer[ed] to congressional intent to provide a remedy . . ." the court "later embraced the doctrinal view disfavoring suits directly against federal enforcement authorities administering anti-discrimination laws . . .").

The D.C. Circuit's departure from this Court's construction of §704 is accordingly, deeply rooted, longstanding and undeniable. This case provides an ideal vehicle for this Court to set the court of appeals on the correct course that *stare decisis* requires. *See, e.g., United States v. Hatter*, 532 U.S. 557, 567 (2001) ("'it is this Court's prerogative alone to overrule one of its precedents'") (quoting *State Oil Co. v. Khan*,

522 U.S. 3, 20 (1997)); *Hohn v. United States*, 524 U.S. 236, 252-53 (1998) ("[o]ur decisions remain binding precedent until we see fit to reconsider them"); *Hutto v. Davis*, 454 U.S. 370, 375 (1982) ("[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts . . .").

The D.C. Circuit's pervasive avoidance of *Bowen* is unmistakable. Aside from *El Rio Santa Cruz*, only two other post-*Bowen* opinions of the D.C. Circuit construing §704 even cite *Bowen*. They are *Esch v. Yeutter*, 876 F.2d 976 (D.C. Cir. 1989), and *National Wrestling Coaches Ass'n v. Department of Education*, 366 F.3d 930 (D.C. Cir. 2004). In *Esch*, the D.C. Circuit dutifully followed and expressly acknowledged *Bowen*'s narrow reading of APA §704, observing that "[g]iven the limited purposes for Section 704's enactment, the Court said, it is to be read narrowly." 876 F.2d at 982. But the decision below in this case made short shrift of *Esch*: it discounted *Esch* as merely holding that "the potential availability of a [Tucker Act] cause of action in the Claims Court was not an adequate remedy because that court lacked equitable jurisdiction and it was doubtful that court had jurisdiction over the plaintiffs claims." 563 F.3d at 526 (App. 118a-119a). In essence, the D.C. Circuit dismissed *Esch* precisely because *Esch* reached the same substantive conclusion as this Court in *Bowen*, and despite the fact that *Esch* is on all fours with *Bowen* in construing §704. *Esch* focused directly on the critical passage in *Bowen* (487 U.S. at 903) in which this Court explicitly described the "'special

and adequate review procedures' that would constitute an 'adequate remedy in a court' within the contemplation of Section 704." *Esch*, 876 F.2d at 982 (citation omitted).

In *National Wrestling Coaches*, not cited in the opinion below, *Bowen*, along with *Esch*, is cited only in Judge Williams' dissenting opinion, noting that "[a]s the Supreme Court explained in *Bowen* . . . § 704 is to be read narrowly so as not 'to defeat the central purpose of providing a broad spectrum of judicial review of agency action.'" 366 F.3d at 958 (Williams, J. dissenting) (quoting *Bowen*, 487 U.S. at 903.).

The D.C. Circuit's other post-*Bowen* opinions construing §704 do not even cite *Bowen*.[3] As this history reflects, the D.C. Circuit has embarked on an incorrect path that is taking it further afield from the course this Court charted in *Bowen* and reaffirmed in *Darby*. Fidelity to the important Congressional purpose underlying the provision of a broad spectrum of judicial review of agency action strongly favors certiorari in this case.

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[3] *See, e.g., Coker v. Sullivan*, 902 F.2d 84 (D.C. Cir. 1990) (holding that plaintiff could not maintain an action under the APA against a federal agency for failure to investigate the wrongdoing of a third party where Congress had provided plaintiff with a right of action against the third party); *Women's Equity Action League v. Cavazos*, 906 F.2d 742 (D.C. Cir. 1990) (same).

C. This Court's Decisions Highlight The D.C. Circuit's Error In Holding That ECOA Provides An Adequate Judicial Remedy For Failure-To-Investigate Claims Based On USDA's Discriminatory Administration Of Non-Credit Farm Programs.

The broad extent of the D.C. Circuit's departure from *Bowen* is strikingly evident in a comment in the decision below about the administrative claims that certain petitioners *did* file. The court observed that "[t]wo *Garcia* appellants filed administrative complaints with the USDA regarding discrimination occurring after 1996" that were not "covered by Section 741," but it regarded that action to be "of no significance because we hold that all of the appellants have an adequate remedy at law in the ECOA for their failure-to-investigate claims." 563 F.3d at 522 n.3.[4] A basic reason why this holding is incompatible with *Bowen* is because ECOA does not cover such non-credit

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[4] As a preliminary factual matter, the record demonstrates that at least eight *Garcia* petitioners filed discrimination complaints with USDA after 1996 concerning USDA's non-credit disaster benefit programs and hence were not covered by §741. (App. 239a-252a). In any event, the D.C. Circuit fundamentally misapprehended petitioners' claims, noting that "[appellants] alleged that the USDA had discriminated against them with respect to credit transactions *and disaster benefits in violation of the ECOA* . . . ." 563 F.3d at 522 (emphasis added) (App. 7a-8a). Petitioners' disaster benefit claims are based on USDA's discriminatory administration of *non-credit* farm benefit programs in violation of the APA, not ECOA.

claims, as the district court clearly recognized. *Garcia v. Veneman*, No. Civ.A. 00-2445 (JR), 2002 WL 33004124 at 2 (D.D.C. Mar. 20, 2002). (App. 93a-99a). Thus, the *Garcia* petitioners asserting claims based upon discrimination in USDA's non-credit benefit programs are, by the D.C. Circuit's own admission, not covered by §741, and therefore cannot possibly have available to them, even under the D.C. Circuit's stated view of §704, "an adequate remedy at law in the ECOA for their failure-to-investigate claims." 563 F.3d at 522 n.3. (App. 8a-9a).

The D.C. Circuit's decision is also contrary to a long line of precedent "noting that the [APA's] 'generous review provisions' must be given a 'hospitable interpretation'" such that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Labs.*, 387 U.S. at 141. While the D.C. Circuit asserted that "there is clear and convincing evidence that in enacting Section 741 Congress did not intend for complainants who choose to proceed in the district court on their ECOA claims to pursue their failure-to-investigate claims under the APA simultaneously in the same lawsuit" (563 F.3d at 523) (App. 11a), the D.C. Circuit did not identify any such evidence. There is no evidence of a legislative intent to bar APA review of plaintiffs' failure-to-investigate claims, much less "*clear and convincing evidence*" of such an intent.

Not only is there an absence of evidence of a legislative intent to bar APA review of plaintiffs' failure-to-investigate claims, there is clear evidence

of Congress' approval of such claims. Indeed, Congress expressly provided that black farmers with refusal-to-investigate claims who missed the filing deadline to participate in the original *Pigford* settlement would be permitted an opportunity to have their claims heard on the merits in the manner prescribed by the *Pigford* consent decree. §§14011-14012 of the Food, Conservation and Energy Act of 2008, Pub. L. 110-246, 122 Stat. 1651 ("2008 Farm Bill"). (App. 253a-259a). Moreover, at the time Congress passed §§14011-14012, it was clearly aware of the other pending discrimination cases against USDA and the fact that the four virtually identical cases had received starkly different treatment in the district court, noting that "all pending claims and class actions brought against [USDA] by socially disadvantaged farmers . . . including Native American, Hispanic, and female farmers or ranchers based on racial, ethnic or gender discrimination in farm program participation should be resolved in an expeditious and just manner." Section 14011 of the 2008 Farm Bill. (App. 253a). Thus, in the absence of such "clear and convincing evidence" of a congressional intent to bar APA review of plaintiffs' failure-to-investigate claims, the D.C. Circuit was required to give "the [APA's] *'generous review provisions'* . . . a *'hospitable interpretation,'*" *Bowen*, 487 U.S. at 904 (quoting *Abbott Labs*, 387 U.S. at 140-41) (emphasis added), thereby fulfilling the APA's "central purpose of providing *a broad spectrum of judicial review of agency action.*" *Id.* at 903 (emphasis added and citations omitted). In stark contrast to that requirement, the D.C. Circuit denied "access to judicial review."

D. USDA's Admittedly Sabotaged And Futile Administrative Process Does Not Constitute An Adequate Remedy.

The fact that §741, like other statutory schemes that routinely give parties to administrative proceedings the option of seeking rehearing, gave farmers the option of resubmitting their complaints to USDA did not preclude farmers from seeking review of USDA's failure to investigate their complaints under the APA. Under settled authority, the long passage of time during which USDA has refused to investigate discrimination complaints rendered those refusals final agency actions for purposes of APA § 704.[5] Moreover, APA § 704 expressly provides that "[e]xcept as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application . . . for any form of reconsideration . . . ." 5 U.S.C. §704. (App. 176a).

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[5] *See, e.g., Radio-Television News Directors Ass'n v. FCC*, 229 F.3d 269, 272 (D.C. Cir. 2000) (twenty year pendency of petition constituted agency action unreasonably delayed); *Fund for Animals v. Norton*, 294 F. Supp. 2d 92, 113 (D.D.C. 2003) ("a five year delay smacks of unreasonableness on [its] face") (internal quotation marks omitted); *In re Bluewater Network & Ocean Advocates*, 234 F.3d 1305, 1376 (D.C. Cir. 2000) (nine-year delay unreasonable); *Potomac Elec. Power Co. v. ICC*, 702 F.2d 1026, 1033-1035 (D.C. Cir. 1983) (eight-year delay unreasonable); *Nader v. FCC*, 520 F.2d 182, 206 (D.C. Cir. 1975) (ten year delay unreasonable).

The D.C. Circuit did not question the finality of USDA's failure to investigate discrimination complaints for purposes of reviewability pursuant to §704. Nor did it undermine in any way the undisputed testimony of Rosalind Gray, the former director of USDA's Office of Civil Rights charged with the task of helping to implement §741, that USDA had sabotaged §741's implementation. (App. 12a-13a, 201a-217a, 233a-238a). Instead, the decision below concluded that because at some indeterminate point years in the future a court *might* review USDA's refusal to investigate resubmitted discrimination claims under the optional and, as a practical matter, non-existent §741 administrative process, an "adequate remedy in a court" bars petitioners' APA claims. 563 F.3d at 523. (App. 11a-12a). The D.C. Circuit's conclusion conflicts with prior authority in at least three respects. First, *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984), relied upon by the D.C. Circuit, does not provide clear guidance on what constitutes unreasonable delay. *Id.* at 80. Second, the courts of appeals have found unreasonable delays ranging from five to twenty years.[6] Third, the D.C. Circuit's suggestions to the contrary notwithstanding, 563 F.3d at 524 (App. 11a-12a), there is no basis for any uncertainty about what might have happened in terms of having their complaints investigated, if farmers had "chosen" the §741 optional administrative process. Indeed, Hispanic farmers who filed discrimination complaints long before USDA purported to

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[6] *See supra* note 5.

implement the optional §741 procedure, during the time of the purported implementation and subsequent thereto all have in common the fact that USDA still has not investigated their complaints (*See, e.g.*, App. 260a-270a).

Moreover, the D.C. Circuit's determination is fundamentally at odds with precedent from this Court recognizing that irreparable harm may result from delay in administrative decisionmaking procedures. *See McCarthy v. Madigan*, 503 U.S. 140, 146-47 (1992) (holding that administrative exhaustion may not be required where there is "an unreasonable or indefinite timeframe for administrative action."); *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561 587 (1989) ("Because the Bank Board's regulations do not place a reasonable time limit on FSLIC's consideration of claims, Coit cannot be required to exhaust those procedures."); *Walker v. Southern Ry.*, 385 U.S. 196, 198 (1966) (possible delay of 10 years in administrative proceedings makes exhaustion unnecessary); *Bowen v. New York*, 476 U.S. 467, 483 (1986) (finding that disability benefit claimants "would be irreparably injured were the exhaustion requirement now enforced against them.").

As the D.C. Circuit noted, the testimony of Rosalind Gray, the former director of USDA's Office of Civil Rights, is unrebutted concerning (1) USDA's intentional efforts to sabotage the implementation of §741, which calls into question the supposed "choice" made by farmers to whom USDA, *inter alia*, intentionally denied notice of the program, and (2)

the utter failure of that optional process. (App. 12a). As former Director Gray testified,

> [f]or the few farmers that opted for the § 741 administrative procedure, their complaints and the staff initially designated to process them were soon merged into the processing of existing and new complaints that poured into OCR. . . . Ultimately, OCR staff was simply not prepared to do the work of the office. In the final analysis . . . despite my best efforts to make the system work properly, the complaint processing system collapsed and complaints, whether submitted pursuant to the optional § 741 procedure or otherwise, were caught up in the dysfunction that characterized OCR.

(App. 237a, ¶10).

For farmers who had already waited years to have their complaints heard, it cannot responsibly be maintained that an intentionally sabotaged and dysfunctional administrative process – that might require them to wait an additional five to twenty years before *perhaps* obtaining judicial review of their claims – constitutes an adequate remedy in a court. Moreover, for the D.C. Circuit to invoke this irredeemably failed process, beset by flaws and irregularities that USDA actively concealed from petitioners in order to claim that an "adequate remedy in a court" existed and then to fault

petitioners for not utilizing it elevates form over substance in a way that is flatly contrary to *Bowen*, 487 U.S. at 905 (noting the inadequacy of relief in the Court of Claims under the Tucker Act). In essence, the D.C. Circuit's invocation of the flawed and futile §741 optional administrative procedure creates a lose-lose scenario for petitioners.

In the past, this Court and other courts of appeals have been vigilant in ensuring the availability of practical judicial remedies for persons adversely affected by such total breakdowns by federal agencies. Take, for example, this Court's opinion in *Bowen v. New York*. In that case, a unanimous Court held that the Social Security Administration's "fixed clandestine policy against [claimants]," justified the district court's equitable tolling of the 60-day statute of limitations that applied to the claims at issue. 476 U.S. at 475. Moreover, the Court held that claimants were excused from exhausting their administrative remedies on the basis that "'[members] of the class could not attack a policy they could not be aware existed.'" *Id.* at 482 (citation omitted); *see also Curry v. Block*, 738 F.2d 1556, 1560-61 (11th Cir. 1984) (holding that the Farmers Home Administration was required to develop "substantive standards," otherwise the deferral relief program would be a mere "empty procedural shell."). The Court's reasoning in *Bowen v. New York* applies with equal force here – *i.e.*, just as claimants should not be required to "attack a policy they could not be aware existed," 476 U.S. at 482, here, petitioners should not

be required to exhaust administrative procedures that are demonstrably utterly defunct.

Finally, there is no principled basis upon which Hispanic farmers and women farmers can be denied the same right to pursue their claims as African American and Native American farmers. That the remedies available to African American farmers in *Pigford* and Native American farmers in *Keepseagle* received the D.C. Circuit's approval adds considerable weight to the Hispanic and women farmers' claims for the same remedies for the same pervasive discrimination. Indeed, to do otherwise would implicate basic questions of fairness regarding the administration of justice. *See, e.g., Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (noting the importance of fairness which gives "'the feeling, so important to a popular government, that justice has been done'") (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 172 (1951)).

Accordingly, the issues in this case have far-reaching practical significance for the thousands of minority farmers nationwide who were victimized by USDA's pervasive, secretive, and indefensible discrimination, and for the sound administration of justice under the APA standards this Court articulated in *Bowen* to which the D.C. Circuit steadfastly refuses to adhere.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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September 15, 2009

APPENDICES

LEXSEE

Analysis
As of: Sep 11, 2009

GUADALUPE L. GARCIA, FOR HIMSELF AND ON BEHALF OF G.A. GARCIA AND SONS FARM, ET AL., APPELLANTS v. THOMAS VILSACK, SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE, APPELLEE; ROSEMARY LOVE, ET AL., APPELLANTS v. THOMAS VILSACK, SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE, APPELLEE

No. 08-5110, No. 08-5135

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

563 F.3d 519; 2009 U.S. App. LEXIS 8977

January 9, 2009, Argued
April 24, 2009, Decided

NOTICE:

THIS OPINION IS SUBJECT TO FORMAL REVISION BEFORE PUBLICATION IN THE FEDERAL REPORTER OR U.S. APP. D.C. REPORTS. USERS ARE REQUESTED TO NOTIFY THE CLERK OF ANY FORMAL ERRORS IN ORDER THAT CORRECTIONS MAY BE MADE BEFORE THE BOUND VOLUMES GO TO PRESS.

PRIOR HISTORY: [**1]

Appeal from the United States District Court for the District of Columbia. (No. 1:00-cv-02445-JR). Appeal from the United States District Court for the District of Columbia. (No. 1:00-cv-02502-JR). *Garcia v. Johanns*, 370 U.S. App. D.C. 280, 444 F.3d 625, 2006 U.S. App. LEXIS 7892 (2006); *Love v. Connor*, 525 F. Supp. 2d 155, 2007 U.S. Dist. LEXIS 87823 (D.D.C., 2007)

CASE SUMMARY:

PROCEDURAL POSTURE: In cases alleging discriminatory distribution of federal farm benefits by the U.S. Department of Agriculture (USDA), appellants, female and Hispanic farmers, sought judicial review of the United States District Court for the District of Columbia's dismissal of their failure-to-investigate claims brought under the Administrative Procedure Act (APA), 5 U.S.C.S. §§ 701-706.

OVERVIEW: The farmers argued that the district court (1) the district court misapplied the Bowen

decision by disregarding record evidence that under 7 U.S.C.S. § 2279 Note (Section 741) there was no real adequate alternative remedy in a court for their failure-to-investigate claims, and (2) failed to follow circuit precedent that permitted a plaintiff to bring an APA claim for the agency's failure to follow its regulations in addition to a non-APA discrimination claim. Congress did not intend for those farmers who chose to proceed in the district court on their Equal Credit Opportunity Act claims to pursue their failure-to-investigate claims under the APA, simultaneously in the same lawsuit. By extending the statute of limitations for administrative complaints and by providing for judicial review of the USDA's determinations, Congress provided the farmers an adequate remedy in court within the meaning of the APA. They were therefore barred from relying on the APA to obtain relief they chose to forego. The farmers' Section 741 futility contention failed to show that in enacting Section 741 Congress did not intend to require eligible complainants to make a choice between two remedial regimes.

OUTCOME: The dismissals of the farmers' APA failure-to-investigate claims were affirmed, and the cased were otherwise remanded to the district court.

CORE TERMS: adequate remedy, failure-to-investigate, judicial review, declaratory, discrimination claims, civil rights, alternative remedy, failure to investigate, discriminated, interlocutory, investigate, lawsuit, farmers, federal agency, failed to follow, de novo, agency action, processing, injunctive, non-credit, disaster, renewed, progeny, intend, renew, obtain relief, federal

government, administrative process, administrative procedures, statute of limitations

COUNSEL: Stephen S. Hill argued the cause for appellants Guadalupe L. Garcia, Jr., et al. With him on the briefs were Alan M. Wiseman, Robert L. Green, and Kenneth C. Anderson.

Barbara S. Wahl argued the cause for appellants Rosemary Love, et al. With her on the briefs were Marc L. Fleischaker, Kristine J. Dunne, Jennifer A. Fischer, Roderic V.O. Boggs, Susan E. Huhta, Alexander John Pires, Jr., and Phillip L. Fraas.

Charles W. Scarborough, Attorney, U.S. Department of Justice, argued the causes the appellee. With him on the brief were Gregory G. Katsas, Assistant Attorney General, Jeffrey A. Taylor, U.S. Attorney, and Marleigh D. Dover, Attorney.

JUDGES: Before: ROGERS and GRIFFITH, Circuit Judges, and EDWARDS, Senior Circuit Judge. Opinion for the Court by Circuit Judge ROGERS.

OPINION BY: ROGERS

OPINION

[*520] ROGERS, *Circuit Judge*: These appeals relate to the continuing efforts by farmers to obtain relief from the discriminatory distribution of federal farm benefits by the United States Department of Agriculture ("USDA"). *See, e.g.*, [**2] *Pigford v. Glickman*, 340 U.S. App. D.C. 420, 206 F.3d 1212 (D.C. Cir. 2000). This time the complaints

were filed by female and Hispanic farmers who alleged [*521] that since 1981 the USDA has unlawfully discriminated against them in the administration of its farm benefit programs and failed to act on their administrative complaints in accordance with USDA regulations. This court affirmed the denial of class action certification and the dismissal of the failure-to-investigate claims brought under the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. §§ 1691-1691f. *Love v. Johanns*, 370 U.S. App. D.C. 96, 439 F.3d 723 (D.C. Cir. 2006); *Garcia v. Johanns*, 370 U.S. App. D.C. 280, 444 F.3d 625 (D.C. Cir. 2006). The question in this second interlocutory appeal is whether appellants' failure-to-investigate claims are reviewable under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. Because appellants fail to show they lack an adequate remedy in a court, we affirm the dismissals of their APA failure-to-investigate claims and remand the cases to the district court.

I.

The ECOA provides that it is "unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction . . . on the basis of race, color, religion, national [**3] origin, sex or marital status, or age." 15 U.S.C. § 1691(a). The statute authorizes the recovery of actual damages from creditors, including the federal government, *see id.* §§ 1691a(e)-(f), 1691e(a), and a court "may grant such equitable and declaratory relief as is necessary to enforce [the ECOA], " as well as "reasonable attorney's fees" to applicants bringing a "successful action." *Id.* § 1691e(c)-(d). Claims

under the ECOA must be filed within two years of the "date of the occurrence of the violation." *Id.* § 1691e(f).

USDA regulations have long provided that applicants alleging discrimination by the USDA in its direct benefit programs may file administrative complaints with the USDA. *See* 7 C.F.R. § 15d.4; *see also Love v. Connor*, 525 F. Supp. 2d 155, 157-58 (D.D.C. 2007). [1] Appellants allege, however, that for years the USDA ignored discrimination complaints like theirs. Indeed, in 1997 the USDA publicly acknowledged that in the early 1980s it "effectively dismantled" its civil rights enforcement apparatus. [2]

1 The USDA regulations treat the filing of administrative complaints alleging discrimination as permissive, rather than mandatory. *See* Nondiscrimination in USDA Conducted Programs and Activities, 63 Fed. Reg. 62,962, 62,963 [**4] (proposed Nov. 10, 1998).

2 CIVIL RIGHTS ACTION TEAM, USDA, CIVIL RIGHTS AT THE UNITED STATES DEPARTMENT OF AGRICULTURE 46-47 (1997); *see also Pigford v. Veneman*, 352 U.S. App. D.C. 214, 292 F.3d 918, 920 (D.C. Cir. 2002); *Treatment of Minority and Limited Resource Producers by the U.S. Department of Agriculture: Hearings Before the H. Subcomm. on Dep't Operations, Nutrition and Foreign Agric. and the H. Comm. on Agric.*, 105th Cong. 97 (1997) (statement of the Secretary of the USDA).

In response, Congress enacted a special remedial statute in 1998 for applicants who had filed a "nonemployment related complaint" with the USDA before July 1, 1997 that alleged discrimination occurring between January 1, 1981 and December 31, 1996. Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, § 741(e), 112 Stat. 2681-31 (codified at 7 U.S.C. § 2279 Note) (hereinafter "Section 741"). The statute extended the ECOA statute of limitations until October 21, 2000, and provided that such eligible complainants could either file an ECOA action in federal court, pursuant to Section 741(a), or renew their administrative complaints and obtain a determination on the merits of their claim from [**5] the USDA, pursuant to Section 741(b). Subsection (b) of the statute required the USDA to timely process renewed administrative complaints, to investigate [*522] the claims, and to issue merits determinations after a hearing on the record. Subsections (d) and (g) provided that complainants denied administrative relief could seek *de novo* review in federal court.

Appellants, nearly all of whom appear to have filed complaints with the USDA before July 1, 1997, [3] chose the first option: On the eve of the October 21, 2000 deadline, they filed complaints in the federal district court here under the ECOA and the Declaratory Judgment Act, 28 U.S.C. § 2201(a). Their complaints also included claims under the APA. [4] They alleged that the USDA had discriminated against them with respect to credit transactions and disaster benefits in violation of the

ECOA, and also had systemically failed to investigate complaints of such discrimination in violation of USDA regulations. In the district court only appellants' ECOA credit transaction claims and the Garcia appellants' APA disaster benefit claims have survived the USDA's motion to dismiss. The district court also denied appellants' motions for class certification [**6] on their remaining ECOA discrimination claims, and this court affirmed upon interlocutory review in 2006. *See Love*, 370 U.S. App. D.C. 96, 439 F.3d 723; *Garcia*, 370 U.S. App. D.C. 280, 444 F.3d 625. Following a remand of the APA failure-to-investigate claims, the district court reaffirmed its dismissal of those claims on the ground that Section 741 provided appellants an adequate remedy at law. *See Love v. Connor*, 525 F. Supp. 2d 155; Order, *Garcia v. Veneman*, Civ. No. 00-2445. The district court certified its interlocutory ruling, and this court granted appellants' petition for leave to appeal pursuant to 28 U.S.C. § 1292(b).

3 Two Garcia appellants filed administrative complaints with the USDA regarding discrimination occurring after 1996. Those complaints would not be covered by Section 741. This is a circumstance of no significance because we hold that all of the appellants have an adequate remedy at law in the ECOA for their failure-to-investigate claims. During oral argument government counsel acknowledged, however, that were agency action on the post-1996-occurrence complaints unreasonably delayed, these Garcia appellants could seek judicial relief in the district court under

Telecommunications Research & Action Center v. FCC, 242 U.S. App. D.C. 222, 750 F.2d 70, 79-80 (D.C. Cir. 1984). [**7] Government counsel expressed no opinion on whether such delay had occurred as to these two administrative complaints. We leave for another day whether *TRAC* relief would be available given our holding that the ECOA provides an adequate remedy at law for failure-to-investigate claims.

4 *See Love v. Veneman*, Civ. No. 00-2502, 2001 U.S. Dist. LEXIS 25201, *17 (D.D.C. Dec. 13, 2001); *Garcia v. Veneman*, 211 F.R.D. 15, 2002 WL 33004124, at *1 (D.D.C. 2002).

II.

The APA provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. In *Bowen v. Massachusetts*, 487 U.S. 879, 904, 108 S. Ct. 2722, 101 L. Ed. 2d 749 (1988), the Supreme Court interpreted § 704 as precluding APA review where Congress has otherwise provided a "special and adequate review procedure." *Id.* at 904 (internal quotations omitted). An alternative remedy will not be adequate under § 704 if the remedy offers only "doubtful and limited relief." *Id.* at 901. So understood, this court has held that the alternative remedy need not provide relief identical to relief under the APA, so long as it offers relief of the "same genre." *El Rio Santa Cruz Neighborhood Health Ctr. v. U.S. Dep't of Health & Human Servs.*, 364 U.S.

App. D.C. 529, 396 F.3d 1265, 1272 (D.C. Cir. 2005). [**8] Thus, for example, relief will be deemed adequate "where a statute affords an opportunity for *de novo* district-court review" of the agency [*523] action. *Id.* at 1270. In such cases, the court has reasoned that "Congress did not intend to permit a litigant challenging an administrative denial . . . to utilize simultaneously both [the review provision] and the APA." *Id.* at 1270 (quoting *Envtl. Defense Fund v. Reilly*, 285 U.S. App. D.C. 316, 909 F.2d 1497, 1501 (D.C. Cir. 1990)) (omission and alteration in original). Relief also will be deemed adequate "where there is a private cause of action against a third party otherwise subject to agency regulation." *Id.* at 1271. In evaluating the availability and adequacy of alternative remedies, however, the court must give the APA "'a hospitable interpretation' such that 'only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review.'" *Id.* at 1270 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 141, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967)); *see also Bowen v. Massachusetts*, 487 U.S. at 904.

Appellants contend that the district court erred in two respects in holding that they could not bring a claim under the APA challenging the USDA's [**9] failure to investigate their civil rights complaints: First, the district court misapplied *Bowen* by disregarding record evidence that under Section 741 there was no real adequate alternative remedy in a court for their failure-to-investigate claims; second, the district court mistakenly relied on this court's precedents involving claims against

an agency for failing to regulate third-party wrongdoers, and therefore failed to follow circuit precedent that permits a plaintiff to bring an APA claim for the agency's failure to follow its regulations in addition to a non-APA discrimination claim. Appellants emphasize that their survival as farmers depends in significant part on their ability to obtain federal benefits authorized by Congress to be administered by the USDA, and that when the USDA fails to comply with its regulations for handling and processing administrative complaints, the benefits systems envisioned by Congress are thwarted and their efforts to survive as farmers are stymied. Although this court has no occasion to doubt appellants' claims of harm, their legal challenges to the dismissal of their APA failure-to-investigate claims are unpersuasive.

First, there is clear and [**10] convincing evidence that in enacting Section 741 Congress did not intend for complainants who choose to proceed in the district court on their ECOA claims to pursue their failure-to-investigate claims under the APA simultaneously in the same lawsuit. In responding to the dilemma presented by the USDA's failure to investigate discrimination claims, Congress resurrected time-barred claims and gave such complainants two options: either file a complaint in the district court or renew their administrative complaint with the USDA with subsequent judicial review if the USDA denied relief. Although appellants had the option first to renew their administrative complaints with the USDA pursuant to Section 741(b), they chose not to do so. Had

appellants done so, the USDA would have been obligated to process, investigate, and adjudicate appellants' complaints of discrimination in a timely fashion and absent relief *de novo* judicial review would be available. Having chosen instead to proceed directly to the district court pursuant to Section 741(a), appellants' complaints sought declaratory and injunctive relief that the USDA should have investigated their old, unrenewed administrative complaints [**11] about discrimination and requiring USDA to develop a better processing system for such claims -- in other words to grant appellants the relief that they chose to forego when they filed their lawsuits pursuant to Section 741(a). By extending the statute of limitations for administrative complaints and by providing for judicial review of USDA's determinations, Congress provided appellants [*524] an adequate remedy in court within the meaning of the APA. Appellants are therefore barred from relying on the APA to obtain relief they chose to forego.

Appellants contend, however, that they were entitled to seek a court order pursuant to the APA to remedy the USDA's failure to investigate their old administrative complaints because the alternative administrative option under Section 741(b) was illusory. To that end, appellants offered unrebutted evidence that the USDA never successfully implemented the required administrative process; they also suggested that no plaintiff has yet obtained *de novo* district court review pursuant to Section 741(b).[5] Because of the flaws in the Section 741(b)

option, appellants conclude that they may obtain through their Section 741(a) complaint relief under the APA [**12] promised by Section 741(b).

> 5 *See, e.g.*, Decl. of Rosalind Gray, Former Director, USDA Office of Civil Rights, Apr. 6, 2002, Gray Supp. Decl., Oct. 18, 2006; Gray Second Supp. Decl., Sept. 12, 2007; *Benoit v. U.S. Dep't of Agric.*, 577 F. Supp. 2d 12 (D.D.C. 2008).

There are two problems with appellants' approach. The first is simply a matter of statutory interpretation. Adoption of appellants' interpretation would effectively rewrite the statute that Congress specifically enacted in response to the USDA's failure to address discrimination complaints. The plain text of Section 741 required complainants to make a choice between going to court immediately or first renewing their administrative complaints. Congress required the USDA to process, investigate, and adjudicate the renewed administrative complaints and afforded complainants who obtained no relief the opportunity to seek *de novo* review in the district court. Each option afforded an in-court remedy. Moreover, had appellants renewed their administrative complaints pursuant to Section 741(b) and thereby attempted to obtain relief pursuant to the APA through the USDA's administrative process, and been unable to obtain a final determination [**13] due to the USDA's unreasonable delay, they could have sought, as government counsel acknowledged during oral argument, relief in the district court under *Telecommunications Research & Action Center v.*

FCC, 242 U.S. App. D.C. 222, 750 F.2d 70, 79-80 (D.C. Cir. 1984). *Cf. In re Core Commc'ns, Inc.*, 382 U.S. App. D.C. 120, 531 F.3d 849, 855, 860 (D.C. Cir. 2008); *In re Tennant*, 360 U.S. App. D.C. 171, 359 F.3d 523, 531 (D.C. Cir. 2004). Appellants' futility contention, then, fails to show that in enacting Section 741 Congress did not intend to require eligible complainants to make a choice between two remedial regimes. *Cf. Engine Mfrs. Ass'n v. EPA*, 319 U.S. App. D.C. 12, 88 F.3d 1075, 1088-89 (D.C. Cir. 1996).

The second problem arises because, even giving credence to appellants' futility suggestion, they still would be unable to show that they lack an adequate remedy at law. Under the ECOA, to the extent appellants can offer proof that the USDA discriminated against them in the administration of its credit programs, appellants will be entitled to recover money damages and attorneys' fees, and, as appropriate, also injunctive and declaratory relief. 15 U.S.C. § 1691e. This court's precedent in *Council of and for the Blind of Delaware County Valley, Inc. v. Regan*, 228 U.S. App. D.C. 295, 709 F.2d 1521 (1983) [**14] (en banc), and its progeny -- *Coker v. Sullivan*, 284 U.S. App. D.C. 119, 902 F.2d 84 (1990), and *Women's Equity Action League v. Cavazos* ("*WEAL*"), 285 U.S. App. D.C. 48, 906 F.2d 742 (1990) -- make clear that an ECOA discrimination claim filed directly against the USDA would be adequate to preclude a cause of action under the APA. In those cases the court held that the plaintiff could not maintain an action under the APA directly against a federal agency for failure to investigate and rectify

the wrongdoing of a third party [*525] where Congress had provided the plaintiff with a private right of action against the third party. *See Council*, 709 F.2d at 1531-33; *Coker*, 902 F.2d at 89-90; *WEAL*, 906 F.2d at 750-51. For example, in *Council*, the plaintiffs had alleged that the Office of Revenue Sharing had failed to process and resolve administrative complaints in a timely manner. On appeal, they contended that a national suit against the federal agency would be more effective. This court held that even so the remedy in the form of a private suit against state and local governments provided by Congress was adequate to address the alleged discrimination. *Council*, 709 F.2d at 1532-33.

The relevant question under the APA, then, is not whether private [**15] lawsuits against the third-party wrongdoer are as effective as an APA lawsuit against the regulating agency, but whether the private suit remedy provided by Congress is adequate. *See Council*, 709 F.2d at 1532; *WEAL*, 906 F.2d at 751. As a result, the availability of actions against individuals may be adequate even if such actions "cannot redress the systemic lags and lapses by federal monitors" and even if such "[s]uits directly against the discriminating entities may be more arduous, and less effective in providing systemic relief, than continuing judicial oversight of federal government enforcement." *WEAL*, 906 F.2d at 751. This is because the court concluded in *Council*, *Coker*, and *WEAL*, "situation-specific litigation affords an adequate, even if imperfect, remedy." *Id.* As explained in *El Rio Santa Cruz*, third-party suits

are an adequate remedy for the alleged victims of statutory violations, like unlawful discrimination, because they provide relief of "the same genre" as that offered by an APA claim. 396 F.3d at 1272 (quoting *WEAL*, 906 F.2d at 751).

Appellants' attempts to avoid this precedent are unpersuasive. The court has confirmed that its approach is consistent with the Supreme [**16] Court's construction of the APA in *Bowen*. In *El Rio Santa Cruz*, the court explained that, consistent with *Bowen, Council, Coker*, and *WEAL* held that an alternative adequate remedy at law exists where Congress chooses to grant those allegedly aggrieved by agency failure to remedy the wrongs of a regulated third parties a private cause of action against those third parties. 396 F.3d at 1270-71. The fact that appellants fault the USDA's regulation of itself and not its regulation of a third party does not mean that *Council* and its progeny are inapposite, because there is no material difference between the adequacy of the ECOA remedy and the third-party actions in *Council, Coker* and *WEAL*. The suggestion that ECOA relief would not vindicate appellants' interest in ensuring that the USDA adheres to its duty-to-investigate regulations, was rejected in *Council, Coker*, and *WEAL* when the court concluded that a direct action against a regulated private party was an adequate remedy at law for whatever additional injury a plaintiff suffered as a result of a federal agency's failure to remedy that violation administratively. *See Council*, 709 F.2d at 1531-33; *Coker*, 902 F.2d at 89-90; *WEAL*, 906 F.2d at 750-51. [**17] If anything, an

ECOA discrimination claim filed directly against the USDA affords a better remedy than those available in *Council, Coker*, and *WEAL*. If successful, a plaintiff can obtain declaratory and injunctive relief against the agency itself, in addition to money damages, and such remedies would presumably deter the USDA to the same extent as a successful APA claim from discriminating against plaintiff-credit applicants and failing to adhere to its duty-to-investigate regulations. On appellants' view of *Council, Coker*, and *WEAL*, the availability of a direct ECOA claim against a private creditor would constitute an adequate [*526] remedy barring APA challenges to the FTC's oversight of a private creditor, *see* 15 U.S.C. §§ 1691c, 1691c(a)-(c); *see also* 22 Op. Off. Legal Counsel 11, 1998 WL 1180049, at *1, but the availability of a nearly identical claim against the USDA would not constitute an adequate remedy. Appellants cannot show that Congress intended such disparate results.

McKenna v. Weinberger, 234 U.S. App. D.C. 297, 729 F.2d 783 (D.C. Cir. 1984), is of no assistance to appellants. In *McKenna*, the court held that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, did not provide the exclusive [**18] judicial remedy for a probationary employee's claim that the agency failed to follow its regulations in effecting an allegedly discriminatory discharge. *Id.* at 791. The court observed that "Ms. McKenna's claim under the APA is *not* one of discrimination. Rather, she charges that the agency, whether its motive was legal or illegal, failed to conform to its own regulations. She does not claim that these procedural

violations constitute employment discrimination." *Id.* (emphasis in original). In other words, her claim related to a personnel matter that was completely distinct from her gender discrimination. Here, by contrast, appellants' APA failure-to-investigate and lending discrimination claims are inextricably linked.

As appellants read *McKenna*, it stands for the proposition that a plaintiff may always bring an APA claim alleging that an agency failed to follow its own regulations in processing or investigating discrimination allegations, notwithstanding the existence of other adequate remedies at law. But *McKenna* cannot bear the weight that appellants place upon it. In *McKenna*, the court did not address whether the judicial and administrative procedures under Title VII constituted an [**19] adequate remedy at law so as to preclude APA review and so cannot be read, as appellants urge, as inconsistent with *Council* and its progeny. Appellants cite to no case that reads *McKenna* that way, and such precedent as we have found does not support their position. [6] In *McKenna* the court simply assumed without deciding that Title VII procedures did not constitute an adequate remedy at law. *Cf. Trudeau v. FTC*, 372 U.S. App. D.C. 335, 456 F.3d 178 (D.C. Cir. 2006). Appellants' other authorities also provide no support. For instance, their reliance on *Esch v. Yeutter*, 278 U.S. App. D.C. 98, 876 F.2d 976, 984-85 (D.C. Cir. 1989), is misplaced; the court held only that the potential availability of a cause of action in the Claims Court was not an adequate remedy because that court lacked equitable jurisdiction and

it was doubtful that court had jurisdiction over the plaintiffs claims.

> 6 *See Nichols v. Agency for Int'l Dev.*, 18 F. Supp. 2d 1, 3 & n.2 (D.D.C. 1998); *Lynch v. Bennett*, 665 F. Supp. 62, 64-65 (D.D.C. 1987).

Remaining are appellants' APA claims that the USDA discriminated in dispersing non-credit disaster benefits, which are not covered by Section 741. We remand these claims. As to the Garcia appellants, the district court's [**20] dismissal did not address their non-credit claims. *See* Order, *Garcia v. Veneman*, 25 F. Supp. 2d 155 (Nov. 30, 2007). As to the Love appellants, the district court's conclusion that there was no reason to allow them to proceed with their non-credit claims "at this time," *Love*, 525 F. Supp. 2d at 161, was not a dismissal with prejudice, *see Foremost Sales Promotions, Inc. v. Dir., Bureau of Alcohol, Tobacco & Firearms*, 812 F.2d 1044, 1045-46 (7th Cir. 1987); 12 MOORE'S FEDERAL PRACTICE § 58.02. Finally, the court will not address the government's jurisdictional and other contentions for dismissal of these claims because the district court has yet to rule [*527] on them and they were not adequately briefed in this interlocutory appeal.

Accordingly, we affirm the dismissals of appellants' APA failure-to-investigate claims and otherwise remand the cases to the district court.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5110 **September Term, 2008**

FILED ON: APRIL 24, 2009

GUADALUPE L. GARCIA, FOR HIMSELF AND ON BEHALF OF G.A. GARCIA AND SONS FARM, ET AL,

APPELLANTS

V.

THOMAS VILSACK, SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE,

APPELLEE

No. 08-5110

ROSEMARY LOVE, ET AL.,

APPELLANTS

V.

THOMAS VILSACK,

APPELLEE

Appeal from the United States District Court

For the District of Columbia

(No. 1:00-cv-02502-JR)

(No. 1:00-cv-02445-JR)

Before: ROGERS AND GRIFFITH, Circuit Judges, and EDWARDS, Senior Circuit Judge

JUDGMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgments of the District Court appealed from in these causes are hereby affirmed as to the dismissals of appellants' APA failure-to-investigate claims and the cases are remanded, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/

Michael C. McGrail

Deputy Clerk

Date: April 24, 2009

Opinion for the court filed by Circuit Judge Rogers.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5110 **September Term 2008**
1:00-cv-02445-JR
Filed On: June 18, 2009

Guadalupe L. Garcia, For himself and on behalf of G.A. GARCIA and SONS FARM, et al.,

Appellants

v.

Thomas J. Vilsack, Secretary, United States Department of Agriculture,

Appellee

No. 85-5135

Rosemary Love, et al.,

Appellants

v.

Thomas J. Vilsack

Appellee

BEFORE: Sentelle, Chief Judge, and Ginsburg, Henderson, Rogers,

Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges, and Edwards, Senior Circuit Judge

ORDER

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

ROSEMARY LOVE, et al., Plaintiffs, v. CHARLES F. CONNOR, Acting Secretary, U.S. Department of Agriculture, Defendant.

Civil Action No. 00-2502 (JR)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

525 F. Supp. 2d 155; 2007 U.S. Dist. LEXIS 87823

November 30, 2007, Filed

SUBSEQUENT HISTORY: Affirmed by, Remanded by Garcia v. Vilsack, 2009 U.S. App. LEXIS 8977 (D.C. Cir., Apr. 24, 2009)

PRIOR HISTORY: Love v. Johanns, 370 U.S. App. D.C. 96, 439 F.3d 723, 2006 U.S. App. LEXIS 5390 (2006)

COUNSEL: [**1] For ROSEMARY LOVE, LIND MARIE BARA-WEAVER, MARGARET ODOM, GAIL LENNON, Plaintiffs: Alexander John Pires, Jr., LEAD ATTORNEY, Washington, DC; Barbara S. Wahl, LEAD ATTORNEY, ARENT FOX KINTNER PLOT-KIN & KAHN, Washington, DC; Kristine J. Dunne, LEAD ATTORNEY, Marc L. Fleischaker, LEAD ATTORNEY, ARENT FOX PLLC, Washington, DC; Phillip L. Fraas, LEAD ATTORNEY, Washington, DC; Susan E. Huhta, LEAD ATTORNEY, WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS, Washington, DC.

For JAMES MURNION, JOANN NEUZIL, Plaintiffs: Alexander John Pires, Jr., LEAD ATTORNEY, Washington, DC; Kristine J. Dunne, LEAD ATTORNEY, Marc L. Fleischaker, LEAD ATTORNEY, ARENT FOX PLLC, Washington, DC; Phillip L. Fraas, LEAD ATTORNEY, Washington, DC.

For JOYCE L. ACOMB, EDITH L. SCRUGGS, MARYLAND B. WYNNE, JOYCE A. KING, PHYLLIS L. ROBERTSON, MARY L. BROWN, on behalf of themselves and all others similarly situated, Plaintiffs: Barbara S. Wahl, LEAD ATTORNEY, ARENT FOX KINTNER PLOTKIN & KAHN, Washington, DC; Alexander John Pires, Jr., Washington, DC; Kristine J. Dunne, Marc L. Fleischaker, ARENT FOX PLLC, Washington, DC; Susan E. Huhta, WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS, Washington, [**2] DC.

For ANN VENEMAN, Defendant: Carlotta Poter Wells, LEAD ATTORNEY, U.S. Department of Justice, Civil Division, Washington, DC.

JUDGES: JAMES ROBERTSON, United States District Judge.

OPINION BY: JAMES ROBERTSON

OPINION

[*156] **MEMORANDUM**

This case is here on remand from the Court of Appeals for "further development" of the merits of the plaintiffs' claims under the APA. Love v. Johanns, 370 U.S. App. D.C. 96, 439 F.3d 723, 732-33 (D.C. Cir. 2006); Garcia v. Johanns, 370 U.S. App. D.C. 280, 444 F.3d 625, 636-637 (D.C. Cir. 2006) (companion case). The facts have been stated elsewhere and will be summarized only briefly here.

Plaintiffs are women farmers who allege discrimination by USDA in the administration of its farm benefit programs, and who further complain that USDA utterly failed [*157] to process or investigate their discrimination complaints when they filed them with the agency many years ago. There is little dispute that USDA dismantled its civil rights investigation program between the early 1980's and the mid-1990's, and did so without informing farmers that their discrimination complaints would be either ignored or summarily denied. See generally USDA Civil Rights Action Team Report: Civil Rights at the U.S. Dept. of Agriculture, [80, Exhibit 3]; 144 Cong. Rec. S11,433 [**3] (Sen. Robb). When Congress learned of this state of affairs, it extended for two years the period of limitations for any cause of action that a plaintiff might bring to redress claims she had filed with USDA in an "eligible complaint." See Pub. L. No. 105-277, 112 Stat. 2681-30, Title VII, Sec. 741 (codified at 7 U.S.C. § 2279 Note) (hereafter "§ 741"). Eligible complaints were defined as complaints filed with USDA between 1981 and 1996 that complained of violations of the Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691 et seq., or of discrimination

in the administration of a commodity assistance or disaster relief program. See § 741(e). Plaintiffs filed this action days before that extended pe-riod ran out. They seek relief both for USDA's alleged discrimination and for USDA's failure to investigate.

In earlier proceedings, I denied a motion to certify a plaintiff class alleging discrimination in violation of ECOA but found that some individual plaintiffs may have viable ECOA claims. I also dismissed plaintiffs' attempt to bring their failure to investigate claim under ECOA. The Court of Appeals affirmed these rulings. Love, 439 F.3d at 728-732 (D.C. Cir. 2006). What re-mains on [**4] this remand is the question whether plaintiffs' failure to investigate claim can be brought under the APA, and whether certain ancillary claims of discrimination in the administration of non-credit benefits can proceed under the APA as well.

Analysis

A. The Regulatory Regime

The regulations that bear upon this case have changed over time. In 1981, departmental regulations stated that persons could file discrimination complaints, that they would be handled "in accordance with the procedures established . . . for the handling of complaints or appeals . . . which are not based on discrimination," and that the "investigative function . . . shall be discharged by the Office of the Inspector General in the manner deter-mined by the Inspector General." See 31 Fed. Reg. 8175. In 1985, this regulation was

amended to replace the Office of the Inspector General with the Assistant Secretary for Administration, but the provision that the investigative function would be discharged "in the manner deter-mined by the Assistant Secretary" was unchanged. See 50 Fed. Reg. 25687.

In 1989, the provision that discrimination complaints would be processed in the same manner as other complaints disappeared.[1] Also, [**5] the regulation was amended to read: "The Director, Office of Advocacy and Enterprise, will make determinations as to the merits of complaints under this subpart and as to corrective actions required to resolve the complaints." See 54 Fed. Reg. 31163 (emphasis added). The commentary that accompanied publication of the final rule noted that this change was intended to "authorize" the Office of Advocacy and Enterprise to investigate and make de [*158] terminations on complaints, and to clarify delegations of authority. Id.

1 Apparently to no effect. No procedures for complaints "not based on discrimination" have been identified by either party.

In 1999, after Congress passed § 741 and after the expiration of the period Congress had established for "eligible complaints," the regulations were amended again. References to the Office of Advocacy and Enterprise were replaced with references to the Office of Civil Rights, and a provision that the "complain[ant] will be notified of the final determination on his or her com-plaint" was added. See 64 Fed. Reg. 66709; 7 C.F.R. § 15d.4. Also in

1999, the Department promulgated an internal "departmental regulation" specifying, apparently for the first time, [**6] the manner in which investigations would be conducted. See Nondiscrimination in USDA-Conducted Programs and Activities, DR-4330-3 [*Garcia Dkt.* 150, Exhibit 15].

The evolution of these regulations sheds at least some light on the question whether they imposed a duty to investigate discrimination claims at the time that plaintiffs filed their eligible complaints, or instead only "authorized" such investigations and described the manner in which they would be carried out. Although I find that to be an interesting question, [2] the parties evidently do not. The government may even have implicitly con-ceded that the regulations did impose a duty to investigate -- focusing its argument instead on the assertion that its exercise of that duty is unreviewable for lack of manageable standards. See Webster v. Doe, 486 U.S. 592, 108 S. Ct. 2047, 100 L. Ed. 2d 632 (1988); Heckler v. Chaney, 470 U.S. 821, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985); Slyper v. Attorney General, 264 U.S. App. D.C. 170, 827 F.2d 821 (D.C. Cir. 1987).

> 2 I doubt that regulatory language describing which office "will" investigate complaints necessarily creates a judicially enforceable entitlement to an investigation, much less an entitlement to the "effective system for investigating and timely responding to complaints" [**7] that plaintiffs ask me to forge and oversee by injunction. [78] at 29.

In any event, both questions -- whether the regulations required an investigation and whether investigation decisions are unreviewable -- are beside the point, be-cause even if plaintiffs have an APA claim under the 1999 regulations, that claim is barred by the existence of an adequate alternative remedy a

B. Adequate Alternative Remedy

The APA provides for judicial review only where plaintiffs have "no other adequate remedy in a court." 5 U.S.C. § 704. The definitive interpretation of this section comes from Bowen v. Massachusetts, 487 U.S. 879, 108 S. Ct. 2722, 101 L. Ed. 2d 749 (1988), where the Supreme Court cited Attorney General Clark's manual on the APA for the proposition that § 704 "does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures." Id. at 903. In this case, it is clear that Congress has expressly addressed the exact injury of which plain-tiffs complain, and provided a "special" and "adequate" remedy for their wrong.

The remedy that Congress fashioned to deal with years of neglect and malfeasance by the Department of Agriculture was "special" because it was [**8] an ex-press response to the injuries of these very plaintiffs. The "special" intent of Congress appears on the face of the Congressional Record, see 144 Cong. Rec. S11,433 (Sen. Robb), and is made self-evident by the definition of "eligible complaint" and the limitation of the extension

remedy to those persons who actually filed complaints that had been neglected.

[*159] The special remedy Congress provided is also plainly "adequate." Not only did it extend all applicable periods of limitation for those prejudiced by agency inaction, but it also allowed any eligible complainant to "seek a determination on the merits of the eligible complaint by the Department of Agriculture" -- in other words, to take up her complaint again with the agency. § 741(b). The legislation required the agency to process such renewed complaints within 180 days if possible, required the agency to award appropriate relief, and required the agency to afford a hearing on the record before making a determination. § 741(b)(1)-(3). Congress also provided for de novo review of any such de-termination in federal court. § 741(c). In short, Congress's remedy allowed any member of the group plaintiffs seek to represent to renew [**9] her complaint with the agency and to get her long-delayed investigation conducted before going to court to vindicate her underlying claim of discrimination if the agency's determination was not entirely to her liking. Congress did not require exhaustion of this newly-enacted procedure, however, and no plaintiff states that she resorted to it before joining this action.

Even in the absence of the "special and adequate" procedures Congress enacted to remedy plaintiffs' particular injuries, circuit precedent precludes an APA suit against an agency charged with overseeing and policing discrimination where a direct cause of action for discrimination exists. The

issue has been brought again and again to the D.C. Circuit, and it has repeatedly reaffirmed its en banc decision in Council of and for the Blind v. Regan, 228 U.S. App. D.C. 295, 709 F.2d 1521 (1983).

Council of and for the Blind denied APA review of the alleged failure of federal officers to terminate the federal funding of discriminating entities because direct suits for discrimination against state and local governments were an adequate remedy. The court was troubled by a hypothetical world in which every instance of agency recalcitrance would require [**10] a court to enter an injunction or contempt order. See Council of and for the Blind, 709 F.2d at 1532. It rejected the suggestion of amicus that it oversee "an investigation of the specific and ongoing practices of [the agency]," noting that such a role would be "more properly conducted by a Congressional subcommittee as part of its oversight function." Id. at 1533.

Two considered opinions of then-Judge Ruth Bader Ginsburg endorsed and elaborated upon the reasoning of Council of and for the Blind. In Coker v. Sullivan, 284 U.S. App. D.C. 119, 902 F.2d 84 (D.C. Cir. 1990), Judge Ginsburg noted the circuit's

> previously expressed hesitation to position this court as supreme supervisor of federal agency enforcement, a role more effectively performed by the Executive under congressional scrutiny. See Council of and for the Blind, 709 F.2d at 1532. As we explained in that case, the APA specifically provides that, if other remedies are adequate, federal courts will not over-see the overseer.

Id. at 89. The basis for this rule is not only the language of the APA, but a concern about traversing unnecessarily into territory beyond the institutional competence of the courts -- especially where traditional suits at law [**11] are available to remedy the core injury at issue.

In Coker, eligible families had sued to compel the Department of Health and Human Services to monitor states' compliance with the requirements of the Emergency Assistance (EA) program. The court concluded that direct suits for assistance grants were an adequate remedy foreclosing oversight relief against the federal government under the APA. The court [*160] noted that "the critical injury plaintiffs allege is the denial of EA to eligible families," Coker, 902 F.2d at 90 n.5, and reiterated that, under Council of and for the Blind, the APA bars "suits where a plaintiff's injury may be remedied in another action, even if that remedy would have no effect upon the challenged agency action." Id. (internal quotation omitted). The application of that holding to this case, where "the critical injury plaintiffs allege" is only a different kind of government benefit, is plain.

In Women's Equity Action League (WEAL) v. Cavazos, 285 U.S. App. D.C. 48, 906 F.2d 742 (D.C. Cir. 1990), Judge Ginsburg reiterated her Coker position. WEAL finally terminated twenty years of litigation in which the district court had come to serve "as nationwide overseer or pacer of procedures government [**12] agencies use to enforce civil rights prescriptions." Id. at 744. The court held that direct suits for discrimination against educational

institutions constituted an adequate remedy precluding APA review of the enforcement and oversight work of the Department of Education. The court made clear that although the alternative of "[s]uits directly against the discriminating entities may be more arduous, and less effective in providing systemic relief," they were still "an adequate, even if imperfect, remedy." Id. at 751. See also Washington Legal Foundation v. Alexander, 299 U.S. App. D.C. 353, 984 F.2d 483 (D.C. Cir. 1993) (direct action under Title VI was adequate remedy precluding review under the APA even if the remedies under Title VI and the APA would be markedly different); Nat'l Wrestling Coaches Assoc. v. Dept. of Ed., 361 U.S. App. D.C. 257, 366 F.3d 930 (D.C. Cir. 2004) (direct action under Title IX was adequate remedy precluding review under the APA).

The rule that emerges from this unbroken line of circuit decisions is that, where a victim of discrimination can sue directly to remedy her injury, no action will lie under the APA for failure to adequately investigate, monitor, or police that discrimination.

Plaintiffs' attempt [**13] to distinguish that rule, and the Council of and for the Blind line of cases, is un-persuasive. It relies chiefly on McKenna v. Weinberger, 234 U.S. App. D.C. 297, 729 F.2d 783 (D.C. Cir. 1984). The plaintiff in McKenna claimed that a government agency discriminated against her by firing her and that it also failed to follow regulations related to her firing -- for example, it failed to give notice two weeks in advance of termination. The court allowed her APA claim and

her discrimination claim to go forward simultaneously, id. at 791, but it did not even cite to Council of and for the Blind, and it noted that McKenna's "claim of arbitrary treatment [was] entirely independent of her discrimination claim." McKenna, 729 F.2d at 791. The independence of the two claims distinguishes McKenna, and not the Council of and for the Blind line of cases, from the case at bar, for whatever can be said of plaintiffs' APA claim here, it is certainly not "entirely independent" of their underlying claims of discrimination.

Plaintiffs also rely heavily on the fact that Council of and for the Blind and WEAL concerned discrimination by third parties rather than the government. Yet this fact is legally irrelevant. As the cases [**14] make clear, what matters is whether the injury can be remedied in a non-APA suit, not the identity of the target in that potential alternative action. See, e.g., Washington Legal Foundation v. Alexander, 984 F.2d at 486; Coker v. Sullivan, 902 F.2d at 90 n.5.

C. Non-Credit Benefits

A small remaining issue between the parties is the viability of claims under [*161] the APA for discrimination in the administration of non-credit benefits. Such claims cannot be brought under ECOA because they are not related to credit transactions, and defendant has not argued that these alleged acts of discrimination can be remedied under another federal law. Section 704 of the APA thus does not appear to be implicated. The Council

of and for the Blind cases are also inapplicable because this APA action complains directly of discrimination, not of failure to investigate or police discrimination. Yet even if an APA action could be maintained for these non-credit instances of discrimination, there appears to be no mention in the third amended complaint of a plain-tiff who actually suffered such discrimination. See [78]. There is also no proper motion pending to amend the complaint to demonstrate that any named plaintiff [**15] has standing to litigate such a claim. There is thus no reason to allow this additional APA cause of action to be maintained at this time.

* * * * *

An appropriate order accompanies this memorandum.

JAMES ROBERTSON

United States District Judge

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

GUADULUPE L. GARCIA, et al.,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	Civil Action
	:	No. 00-2445
	:	(JR)
	:	
ANN V. VENEMAN, Secretary,	:	
United States Department of	:	
Agriculture	:	
	:	
Defendant.	:	

ORDER

Upon remand from the court of appeals, and having carefully considered the arguments advanced by these plaintiffs in support of their claims under the Administrative Procedure Act, I find that their claims for

failure to investigate discrimination must be dismissed for the reasons set forth in my memorandum in Love v. Veneman, 00-2502 (D.D.C. Nov. 30, 2007), which is attached hereto. The APA cause of action with respect to such claims is therefore **DISMISSED**.

JAMES ROBERTSON

United States District Judge

LEXSEE

Caution
As of: Sep 11, 2009

GUADALUPE L. GARCIA FOR HIMSELF AND ON BEHALF OF G.A. GARCIA AND SONS FARM ET AL., APPELLANTS v. MICHAEL JOHANNS, SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE, APPELLEE

Nos. 04-5448 and 05-5002

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

444 F.3d 625; 370 U.S. App. D.C. 280; 2006 U.S. App. LEXIS 7892; 64 Fed. R. Serv. 3d (Callaghan) 475

February 6, 2006, Argued

March 31, 2006, Decided

SUBSEQUENT HISTORY: Subsequent appeal at, Remanded by *Garcia v. Vilsack*, 2009 U.S. App. LEXIS 8977 (D.C. Cir., Apr. 24, 2009)

PRIOR HISTORY: [***1] Appeals from the United States District Court for the District of Columbia. (No. 00cv02445). *Garcia v. Veneman*, 224 F.R.D. 8, 2004 U.S. Dist. LEXIS 18400 (D.D.C., 2004)

CASE SUMMARY:

PROCEDURAL POSTURE: Appellants, Hispanic farmers, filed an action in the U.S. District Court for the District of Columbia, alleging that appellee U.S. Department of Agriculture (USDA) committed discrimination while administering federally-funded loan and benefit programs for American farmers. The district court denied the farmers' motion for class certification and granted the USDA's motion to dismiss the action. The farmers appealed.

OVERVIEW: The farmers claimed that programs the USDA created to loan money to farmers violated the Equal Credit Opportunity Act (ECOA), 15 U.S.C.S. § 1691 et seq., and were racially discriminatory, and they sought class certification and a judgment declaring that the USDA violated their rights under the ECOA and the Administrative Procedure Act (APA), 5 U.S.C.S. § 551 *et seq.*, when it failed to investigate their claims alleging discrimination. The court of appeals held that the district court did not abuse its discretion when it found that the farmers failed to show questions of fact or law common to a class that allowed class certification under Fed. R. Civ. P. 23. The court of

appeals also affirmed the district court's judgment dismissing the farmers' claim that the USDA violated the ECOA when it failed to investigate their complaints alleging discrimination because discrimination complaints were not "credit transactions" within the meaning of the ECOA. However, the court of appeals declined to exercise jurisdiction regarding the farmers' appeal from the district court's judgment dismissing their claim that the USDA violated the APA, and it remanded that claim.

OUTCOME: The court of appeals affirmed the district court's judgment denying the farmers' motion for class certification, affirmed the district court's judgment dismissing the farmers' claim that the USDA violated the ECOA when it failed to investigate their claims alleging discrimination, dismissed the farmers' appeal from the district court's judgment dismissing their claim that the USDA violated the APA, and remanded the case.

CORE TERMS: class certification, farmer, disparate impact, commonality, facially neutral, disparate treatment, failure-to-investigate, statistical evidence, farm, certification, geographic, discriminatory, decisionmakers, variable, statistical, subjective, infer, abuse of discretion, employment practice, eligibility, declaration, regression, promotion, putative, certify, spread, individual's claim, farm programs, civil rights, decisionmaking process

COUNSEL: Stephen S. Hill argued the cause for the appellants. Alan M. Wiseman, Robert L. Green and Kenneth C. Anderson were on brief.

Charles W. Scarborough, Attorney, United States Department of Justice, argued the cause for the appellee. Peter D. Keisler, Assistant Attorney General, Kenneth L. Wainstein, United States Attorney, and Robert M. Loeb, Attorney, United States Department of Justice, were on brief.

Glen D. Nager, Shay Dvoretzky, Jason J. Jarvis and Robin S. Conrad were on brief for amicus curiae Chamber of Commerce of the United States of America.

JUDGES: Before: SENTELLE and HENDERSON, Circuit Judges, and EDWARDS, Senior Circuit Judge. Opinion for the court filed by Circuit Judge HENDERSON.

OPINION BY: KAREN LECRAFT HENDERSON

OPINION

[**283] [*628] KAREN LECRAFT HENDERSON, *Circuit Judge*: This appeal arises from one of several actions brought against the United States Department of Agriculture (Department or USDA) alleging discrimination in the administration of various federally-funded loan and benefit programs for American farmers. [1] The appellants, individual Hispanic farmers, seek to represent [***2] a class of similarly situated Hispanic farmers throughout the nation who claim that the Department discriminated against them in denying them farm loans and other benefits because of their ethnicity and that it failed to investigate the discrimination complaints they subsequently filed

with the Department. In the district court, the appellants sought class certification and the USDA moved to dismiss, inter alia, the failure-to-investigate claim. The district court granted the Department's motion to dismiss and denied class certification, concluding that the appellants had failed to meet the requirements of Federal Rule of Civil Procedure 23(a) and 23(b). For the reasons that follow, we affirm in part and remand in part.

> 1 *See, e.g.*, *Pigford v. Johanns*, 367 U.S. App. D.C. 350, 416 F.3d 12, 14 (D.C. Cir. 2005) (black farmers); *Keepseagle v. Glickman*, 194 F.R.D. 1 (D.D.C. 2000) (Native American farmers). A related appeal challenging the district court's denial of class certification to women farmers was heard the same day as this appeal. *See* Love v. Johanns, 370 U.S. App. D.C. 96, 439 F.3d 723 (D.C. Cir. 2006).

[***3] I.

The Farm Service Administration (FSA) [2] administers the Department's various loan programs for American farmers through county committees, the members of which are selected locally and are located in over 2,700 counties nationwide. A farmer seeking a loan must first obtain an application from his county committee. 7 C.F.R. § 1910.4(b). He then submits the completed application to the committee which determines whether the farmer meets specific USDA loan criteria, including, inter alia, citizenship, legal capacity to incur debt, education and farming experience, farm size, inability to obtain sufficient

credit elsewhere and character. *Id.* §§ 1941.12 (2006), 1943.12(a) (2006) , 1943.12 (1988), 764.4 (2006). If an unsuccessful applicant believes the committee discriminated against him in denying his application, he may lodge a complaint with either the USDA Secretary or the USDA Office of Civil Rights. *Id.* § 15.6. USDA regulations provide that complaints "shall [*629] [**284] be investigated in the manner determined by the Assistant Secretary for Civil Rights and such further action taken by the Agency or the Secretary as may be warranted." *Id.*

2 In 1994, the Farmers Home Administration (FmHA) was combined with other Department entities to form the FSA. *See United States v. Lewis County*, 175 F.3d 671, 673 n.2 (9th Cir. 1999) (citing 7 U.S.C. § 6932 (Supp. 1998)). All references are to the FSA.

[***4] On October 13, 2000, ten Hispanic farmers filed this action in the district court. The complaint set forth three counts. [3] Count I sought a declaratory judgment to determine "the rights of plaintiffs and the Class members under the defendant's farm programs including their right to equal credit, and equal participation in farm program, and their right to full and timely enforcement of racial discrimination complaints." 2d Am. Compl. at 56, *reprinted in* Joint Appendix (JA) 83. The second count alleged a violation of the Equal Credit Opportunity Act (ECOA), 15 U.S.C. §§ 1691 *et seq.* [4] JA 84. Specifically, the appellants alleged that the "defendant's acts of denying plaintiffs and Class members credit and other benefits and

systematically failing to properly process their discrimination complaints was racially discriminatory and contrary to the [ECOA]." JA 84. Finally, the appellants alleged a violation of the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* JA 84. The appellants sought declaratory relief as well as $ 20 billion in damages. JA 85. Their complaint also proposed a class of

> all Hispanic participants [***5] in FSA farm programs who *petitioned* or would have petitioned had they not been . . . prevented from timely filing a complaint [against] USDA at any time between January 1, 1981, and the present for relief from . . . racial discrimination . . . and who, because of the failings in the USDA civil rights complaint processing system . . . were denied equal protection . . . and due process in the handling of their . . . complaints.

JA 78 (emphasis in original). [5]

3 Although they subsequently amended their original complaint twice, *see infra*, n.5, the substantive counts did not change.

4 ECOA creates a private right of action against a creditor, including the United States, 15 U.S.C. § 1691e(a), who "discriminates against any applicant, with respect to any aspect of a credit transaction" "on the basis of race, color, religion, national origin, sex or marital status, or age" or "because the

applicant has in good faith exercised any right under this chapter." *Id.* § 1691(a). The regulations governing ECOA define a "credit transaction" as "every aspect of an applicant's dealings with a creditor regarding an application for credit or an existing extension of credit (including, but not limited to, information requirements; investigation procedures; standards of creditworthiness; terms of credit; furnishing of credit information; revocation, alteration, or termination of credit; and collection procedures)." 12 C.F.R. § 202.2(m). Although ECOA claims are subject to a two-year statute of limitations, *see* 15 U.S.C. § 1691e(f), the Congress retroactively extended the limitations period for individuals who had filed administrative complaints with the USDA between January 1, 1981, and July 1, 1997 for alleged acts of discrimination occurring between January 1, 1981 and December 31, 1996. *See* Pub. L. No. 105-277, § 741, 112 Stat. 2681 (*reprinted in* 7 U.S.C.A. § 2279 notes).

[***6]

5 All references are to the appellants' Second Amended Complaint. The appellants eventually moved to file a Third Amended Complaint, which the district court denied. *See Garcia v. Veneman*, 224 F.R.D. 8, 16 (D.D.C. 2004); *see also infra* n.13.

On December 22, 2000, the Department moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(1), contending that the court lacked jurisdiction over the ECOA claim because the appellants had not exhausted their administrative remedies and that, in any event, their claims were time-barred. In addition, the Department moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), arguing that the appellants had failed to state a claim under ECOA, the [*630] [**285] APA or the Declaratory Judgment Act, 28 U.S.C. §§ 2201 *et seq*. On March 20, 2002, the district denied the motion in part and granted it in part, relying on its earlier--and [***7] similar--order in *Love v. Veneman*, 2001 U.S. Dist. LEXIS 25201, No. 00-2502 (D.D.C. Dec. 13, 2001). *Garcia v. Veneman*, No. 00-2445 (D.D.C. Mar. 20, 2002), *reprinted in* JA 95-99. Of relevance here, the court dismissed the failure-to-investigate claim, concluding that the appellants failed to state a claim under ECOA because the investigation of a discrimination complaint is not a "credit transaction" within the meaning of ECOA. JA 97-98. It further held that the claim was not cognizable under the APA because ECOA provides "an adequate remedy." JA 97-98.

On December 2, 2002, the district court denied class certification. *Garcia v. Veneman*, 211 F.R.D. 15 (D.D.C. 2002) (*Garcia I*). It concluded that the appellants failed to show the required "commonality" under Federal Rule of Civil Procedure 23(a)(2) and did not represent a certifiable class under Rule 23(b). They did not show commonality, the court concluded, because they did not demonstrate that the

Department operated under a general policy of discrimination nor did they identify a common USDA policy or practice that disparately affected them. *Id.* at 19-22. The court then [***8] considered whether the requested class could be certified under Rule 23(b) and concluded that Rule 23(b)(2) certification was inappropriate because the $ 20 billion in damages they sought predominated over their request for equitable relief. *Id.* at 22-23. The court also found Rule 23(b)(3) certification inappropriate because they had not shown that common questions predominated. *Id.* at 23-24.

After additional discovery, the appellants submitted a supplemental brief on the issue of commonality, which the district court treated as a renewed motion for class certification. *Garcia v. Veneman*, 224 F.R.D. 8 (D.D.C. 2004) (*Garcia II*). They had obtained in discovery 37 USDA loan and disaster benefit files as well as two USDA databases which, they alleged, showed the requisite commonality for both their disparate impact and their disparate treatment allegations of discrimination. *Id.* at 10. They argued that the files revealed that the USDA had denied Hispanic farmers' applications based on the subjective, rather than the objective, eligibility criteria set forth in 7 C.F.R. § 15.6 and that, as a [***9] result, the use of subjective criteria had a disparate impact on them. *Id.* at 13-15. They also claimed that the USDA as a "single actor" had treated them discriminatorily through a pattern and practice of discrimination. *Id.* at 10. They listed five sub-patterns of discrimination, including (i) refusal to provide

Hispanic farmers with loan applications or assistance in completing applications; (ii) subjecting Hispanic farmers to protracted delays in processing and funding their loans; (iii) using subjective criteria to reject the applications of Hispanic farmers; (iv) unnecessarily subjecting Hispanic farmers to the inconvenience of supervised bank accounts; and (v) delaying or denying loan servicing for Hispanic farmers. *Id.* at 10. The court nevertheless concluded that, even with their supplementation, they failed to demonstrate commonality.

On September 24, 2004, the appellants moved the district court to certify the order dismissing their failure-to-investigate claim for interlocutory appeal under 28 U.S.C. § 1292(b), which motion the court granted. *Garcia v. Veneman*, 224 F.R.D. 8, No. 00-2445 (D.D.C. Sept. 27, 2004). [***10] In accordance with Federal Rule of Civil Procedure 23(f), the appellants petitioned this court on September 22, 2004 for leave to file an interlocutory appeal of the class certification denial, which petition we granted. *In re Garcia ex rel. G.A. Garcia & Sons Farm*, 2004 U.S. App. LEXIS 26406, No. 04-8008 (D.C. Cir. Dec. 16, [*631] [**286] 2004). Before us for review, then, are three orders, namely *Garcia*, No. 00-2445 (D.D.C. Mar. 20, 2002) (granting motion to dismiss), *Garcia I*, 211 F.R.D. 15 (D.D.C. 2004) (denying class certification), and *Garcia II*, 224 F.R.D. 8 (D.D.C. 2004) (denying class certification again).

II.

As we have recognized, the district court is "uniquely well situated" to rule on class certification matters. *Wagner v. Taylor*, 266 U.S. App. D.C. 414, 836 F.2d 578, 586 (D.C. Cir. 1987). Accordingly, we review a certification ruling "conservatively only to ensure against abuse of discretion or erroneous application of legal criteria," *id.*, and we will affirm the district court even if we would have ruled differently in the first instance. *See McCarthy v. Kleindienst*, 239 U.S. App. D.C. 247, 741 F.2d 1406, 1410 (D.C. Cir. 1984). [***11]

Under Federal Rule of Civil Procedure 23(a), a plaintiff seeking class certification must show that:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Failure to adequately demonstrate any of the four is fatal to class certification. *See In re Lorazepam & Clorazepate Antitrust Litig.*, 351 U.S. App. D.C. 223, 289 F.3d 98, 106 (D.C. Cir. 2002). The district court found that the appellants failed to show "questions of law or fact common to the class" or "commonality" under Rule 23(a)(2). We affirm that ruling. [6]

6 If a plaintiff meets the requirements of Rule 23(a), he must then establish that class certification is appropriate under one of the three alternatives of Rule 23(b). *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613-16, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997). Although the district court found that certification was also inappropriate under subsections (b)(2) and (3), we do not reach that holding because of our affirmance of its subsection (a)(2) holding. *See Love v. Johanns*, 439 F.3d 723, slip op. at 13 n.3 (D.C. Cir. 2006).

[***12] To establish commonality under Rule 23(a)(2), a plaintiff must identify at least one question common to all members of the class. *See In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 528 (3d Cir. 2004). Not every common question, however, suffices under subsection (a)(2). As the United States Supreme Court declared of an alleged disparate treatment class in a Title VII action,

> there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims.

Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982). [7] Following *Falcon*, we have required [*632] [**287] a plaintiff seeking to certify a disparate treatment class under Title VII to "make a significant showing to permit the court to infer that members of the class suffered from [***13] a common policy of discrimination that pervaded all of the employer's challenged employment decisions." *Hartman v. Duffey*, 305 U.S. App. D.C. 256, 19 F.3d 1459, 1470 (D.C. Cir. 1994). And in *Love v. Veneman*, we held that a showing of commonality for a disparate treatment class under ECOA requires the plaintiff to show "(i) discrimination (ii) against a particular group (iii) of which the plaintiff is a member, *plus* (iv) some additional factor that 'permits the court to infer that members of the class suffered from a common policy of discrimination.'" 439 F.3d 723, slip op. at 9. (emphasis in original) (citation omitted) (alteration in original).

> 7 Other courts have used Title VII precedent in cases involving ECOA. *See, e.g., Mays v. Buckeye Rural Elec. Co-op., Inc.*, 277 F.3d 873, 876 (6th Cir. 2002) ("Given the similar purposes of the ECOA and Title VII, the burden-allocation system of federal employment discrimination law provides an analytical framework for claims of credit discrimination."); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215 (1st Cir. 2000) ("In interpreting the ECOA, this court looks to Title VII case law . . . ."); *Bhandari v. First Nat'l Bank of Commerce*, 808 F.2d 1082, 1100 (5th Cir. 1987) ("The

> language [of ECOA] is closely related to that of Title VII of the Equal Employment Opportunity Act ("EEOA"), 42 U.S.C. § 2000e-2, and was intended to be interpreted similarly.").

[***14] Regarding the appellants' challenge to Department action with an allegedly class-wide discriminatory *impact*, they must make a showing sufficient to permit the court to infer that members of the class experienced discrimination as a result of the disparate effect of a facially neutral policy. *See Cooper v. S. Co.*, 390 F.3d 695, 716 (11th Cir. 2004). That is, similar to our formulation of the commonality showing necessary for a disparate treatment class set out in *Love v. Johanns*, the appellants must show for their disparate *impact* class (i) a discriminatory impact, (ii) affecting a particular group, (iii) of which the plaintiffs are members, (iv) resulting from a common facially neutral policy or practice.

A.

First, the appellants contend that the district court erred in denying class certification of their discriminatory treatment claim based on the geographic spread of the local decisionmakers, labeling it a "pattern and practice" claim, *see* Appellants' Br. at 40. *But see Garcia I*, 211 F.R.D. at 22 ("Commonality is defeated . . . by the large numbers and geographic dispersion of the decision-makers . . . ."). As with a Title VII [***15] claim, to establish a charge of pattern and practice discrimination under ECOA, a putative class must

prove that "discrimination was the company's standard operating procedure--the regular rather than the unusual practice." *Bazemore v. Friday*, 478 U.S. 385, 398, 106 S. Ct. 3000, 92 L. Ed. 2d 315 (1986) (quoting *Teamsters v. United States*, 431 U.S. 324, 336, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977)). Similarly, to show commonality under Federal Rule of Civil Procedure 23(a)(2), the plaintiff must "make a significant showing to permit the court to infer that members of the class suffered from a common policy of discrimination that pervaded all of the [defendant's] challenged . . . decisions." *Hartman*, 19 F.3d at 1472.

"As is now well recognized, the class action commonality criteria are, in general, more easily met when a disparate impact rather than a disparate treatment theory underlies a class claim." *Stastny v. S. Bell Tel. & Tel. Co.*, 628 F.2d 267, 274 n.10 (4th Cir. 1980). Establishing commonality for a disparate treatment class is particularly difficult where, as here, multiple decisionmakers with significant [***16] local autonomy exist. *Id* at 278-80 (reversing class certification because of geographic separation of workforce and autonomy of local decisionmakers); *see also Cooper*, 390 F.3d at 715. The appellants failed to identify any centralized, uniform policy or practice of discrimination by the USDA [*633] [**288] that formed the basis for discrimination against Hispanic loan applicants with varied eligibility criteria in over 2,700 counties nationwide over a 20-year period. Rather, despite the appellants' allegation that the USDA's actions are those of a "single actor," their claims arise from multiple individual decisions made

by multiple individual committees. Moreover, they do not cite a single reversal of a district court's denial of class certification based on no commonality resulting from the geographic spread of the decisionmakers. [8] *Cf. Stastny*, 628 F.2d at 278-79 (district court abused discretion in certifying class of employees spread through "great number of geographically dispersed facilities" with "almost complete local autonomy"). Our standard of review is deferential and the appellants have failed to convince us that the district court [***17] abused its discretion in denying class certification to the appellants' alleged disparate treatment class.

B.

8 The appellants contend that we cannot rely on the geographic spread of defendant decisionmakers in deciding whether to certify a disparate treatment class. Appellants' Br. at 40. They are wrong. *See, e.g., Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565, 571 (6th Cir. 2004) (no abuse of discretion in denying certification of class of all black employees at four separate facilities of defendant over 20 year period); *Cooper*, 390 F.3d at 715 (no abuse of discretion in denying class certification to employees working for different defendants throughout wide geographic area and encompassing range of working environments); *Stastny*, 628 F.2d at 278-79 (no abuse of discretion in denying class certification to employees working in different plants with local decisionmakers throughout state); *Webb v.*

Merck & Co., Inc., 206 F.R.D. 399, 406 (E.D. Pa. 2002) (denying class certification "cutting across employment status, job categories, facilities and geographic regions").

[***18] We next consider the appellants' claim that the district court erred in failing to certify a class on whose members the Department's facially neutral action has had a discriminatorily disparate impact. Assuming without deciding that a disparate impact claim is cognizable under ECOA, [9] the claim would require a plaintiff to "identify a specific policy or practice which the defendant has used to discriminate and must also demonstrate with statistical evidence that the practice or policy has an adverse effect on the protected group." *Powell v. Am. Gen. Fin., Inc.*, 310 F. Supp. 2d 481, 487 (N.D.N.Y. 2004) (recognizing disparate impact claim under ECOA).

9 Both Title VII and the Age Discrimination in Employment Act (ADEA) prohibit actions that "otherwise adversely affect" a protected individual. *See* 42 U.S.C. § 2000e-2(a)(2); 29 U.S.C. § 623(a)(2). The Supreme Court has held that this language gives rise to a cause of action for disparate impact discrimination under Title VII and the ADEA. *See Smith v. City of Jackson*, 544 U.S. 228, 125 S. Ct. 1536, 1540, 161 L. Ed. 2d 410 (2005) (ADEA); *Griggs v. Duke Power Co.*, 401 U.S. 424, 432, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971) (Title VII). ECOA contains no such language. We express no opinion about whether a disparate impact claim

can be pursued under ECOA. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974) (court should not examine whether "plaintiffs have stated a cause of action or will prevail on the merits" in determining class certification *vel non*).

[***19] The appellants press two alternative theories to support their contention that the district court erred in not certifying a disparate impact class. First, they argue that they do not need to specify a facially neutral practice if it is impossible to determine which of the USDA eligibility criteria have had the discriminatory effect, instead borrowing from Title VII's "one employment practice" notion. [10] Alternately, they argue the USDA's subjective decisionmaking [*634] [**289] process constitutes the common facially neutral practice. We reject both theories and instead affirm the district court's denial of class certification because the appellants failed to show a *common* facially neutral USDA farm loan policy, resulting in the disparate effect on them and the putative class of Hispanic farmers. *See Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 292 (2d Cir. 1999) ("Of course, class certification would not be warranted absent some showing that the challenged practice . . . has a disparate impact on African-American employees at Metro-North."). As the Supreme Court noted in *Falcon*--where class certification was denied--"the mere fact that an aggrieved private plaintiff [***20] is a member of an identifiable class of persons of the same race or national origin is insufficient to

establish his standing to litigate on their behalf all possible claims of discrimination against a common employer." *Falcon*, 457 U.S. at 159 n.15.

10 The appellants cite the "one employment practice" language of Title VII, *see* 42 U.S.C. § 2000e-2(k)(1)(B)(I), and argue that it relieves them from having to tie a disparate impact to a facially neutral USDA policy. Appellants Br. at 34-38. The Congress added the "one employment policy" language following the Supreme Court's holding in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S. Ct. 2115, 104 L. Ed. 2d 733 (1989). It provides that "if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice." 42 U.S.C. § 2000e-2(k)(1)(B)(I). Assuming--again, without deciding--the "one employment practice" notion applies to an ECOA disparate impact claim, it does not alter the required commonality showing under Federal Rule of Civil Procedure 23(a)(2). The appellants erroneously confuse the commonality showing with the prima facie case of disparate impact discrimination. *See Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565, 572 (6th Cir. 2004) ("Plaintiffs cannot avoid the heavy lifting of showing eligibility for class certification by conflating two exceptions to separate rules for adjudicating discrimination cases."). Under Rule 23(a)(2), the appellants

must show that the putative class members have something in common--they all suffered an adverse effect from the same facially neutral policy, *see id.*--and their showing must be "significant," *see Hartman*, 19 F.3d at 1470. On the other hand, courts have set a lower bar for establishing a prima facie discrimination case. *See, e.g., Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); *Bundy v. Jackson*, 205 U.S. App. D.C. 444, 641 F.2d 934, 950 (D.C. Cir. 1981) (recognizing difficulty plaintiff faces in proving motive behind employer's actions).

[***21] In *Garcia I*, 211 F.R.D. at 21-22, the district court rejected the appellants' disparate impact claim because they did not connect disparate impact with a common facially neutral USDA policy. They had submitted the declaration of Jerry Hausman, an expert in econometrics and microeconomics, in which declaration he concluded that Hispanic farmers received a lower percentage of USDA loans than white farmers received in 1997. JA 123. Hausman, however, analyzed *all* farmers (white and Hispanic) as opposed to only those farmers (white and Hispanic) who had applied for USDA loans. After further discovery produced USDA loan databases, two of which the appellants used to support their renewed class certification motion, they submitted the declaration of statistician Karl Pavlovic, who found that 72 per cent of white applications were approved in the period from October 1997 to January 2003 while 59 per cent of Hispanic applications were approved in the same

period. JA 477. In *Garcia II*, the district court assumed a disparate impact without discussion of Pavlovic's declaration. *Garcia II*, 224 F.R.D. at 11. The court, however, again concluded that the [***22] appellants had failed to connect the disparate impact to a common facially neutral USDA policy. *Id.* (rejecting appellants' argument because "not only does it 'leapfrog to the merits,' . . . but it also [*635] [**290] boils down to the proposition that unexplained discrepancies in the distribution of government benefits satisfy the commonality requirement of Rule 23(a)(2) without more").

The appellants attempted to connect the disparate impact to USDA's subjective loan decisionmaking criteria, relying in part on statistical evidence. But their statistical analyses were analytically flawed because they did not incorporate key relevant variables connecting disparate impact to loan decisionmaking criteria. *See Bazemore v. Friday*, 478 U.S. 385, 400 n.10, 106 S. Ct. 3000, 92 L. Ed. 2d 315 (1986) ("some regressions [are] so incomplete as to be inadmissible as irrelevant"). It does not suffice under Rule 23(a)(2) to show an ethnic imbalance in the USDA's award of loans to farmers; rather, the appellants must show that a common facially neutral policy caused the imbalance. *See Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656-57, 109 S. Ct. 2115, 104 L. Ed. 2d 733 (1989) ("[A] Title VII plaintiff [***23] does not make a case of disparate impact simply by showing that, 'at the bottom line,' there is racial imbalance in the work force."); *Caridad*, 191 F.3d at 292. The appellants could have done this, for instance, by employing

multiple regression. *See Love v. Johanns*, 439 F.3d 723, slip op. at 16 ("Instead of conducting a relatively simple statistical analysis (such as a multiple regression) to control for any or all of these variables, O'Brien simply reported a series of elementary cross-tabulations, from which it is impossible--as a statistical matter--to draw meaningful conclusions."); *see also Segar v. Smith*, 238 U.S. App. D.C. 103, 738 F.2d 1249, 1261 (D.C. Cir. 1984) ("Multiple regression is a form of statistical analysis used increasingly in Title VII actions that measures the discrete influence independent variables have on a dependent variable such as salary levels."). The appellants' statistics failed to account for variables that affected the analyses such as whether fewer Hispanic farmers were U.S. citizens, whether Hispanic farmers had worse credit and whether Hispanic farmers had less experience. *Love*, 439 F.3d 723, slip. op. at 15-16.

[***24] The district court thus acted within its discretion in rejecting the appellants' statistical showing as insufficient to infer classwide discrimination arising from the Department's administration of the farmers' loan programs. Its decision to deny class certification "did not constitute a clear error of judgment, nor [was it] otherwise outside the range of choices the district court was allowed to make." *Cooper*, 390 F.3d at 715. We, of course, do not suggest that statistical evidence alone could never show commonality; we simply believe that the district court did not abuse its discretion in finding the appellants' statistical evidence inadequate. *See Hartman*, 19 F.3d at 1473 ("While

statistics can generally be probative of the question of commonality, we would feel uncomfortable in resting on the trial statistics in the present record for a final determination of commonality."). [11]

11 We think the class certification issue here is similar to that in *Cooper v. Southern Co.*, 390 F.3d 695 (11th Cir. 2004), in which the Eleventh Circuit affirmed the denial of class certification in a Title VII action. Seven African-American employees of Southern Company and several of its subsidiaries sought to represent a class alleging disparate impact and disparate treatment claims in connection with promotion opportunities, performance evaluations and compensation. The court found that the "plaintiffs' statistical evidence was insufficient to establish a presumption of discrimination *common* to the claims of all members of the putative class." *Id.* at 719 (emphasis in original). "Analytical flaws in the statistical evidence" prevented the *Cooper* plaintiffs from making a showing sufficient to "'raise a presumption of discrimination arising from the collective whole of Defendant's compensation and promotion policies. Thus, disparate impact analysis produced no evidence *common* to the claims of all class members.'" *Id.* at 716 (quoting *Cooper v. S. Co.*, 205 F.R.D. 596, 613 (N.D. Ga. 2001)) (alteration and emphases in original). The statistical evidence there did not account for variables such as an employee's type or level of acquired skills and field of study, the quality, type and relevance of

> an employee's experience, an employee's job performance, etc., to ensure that black and white employees were similarly situated. *Compare id.* at 717 *with Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 293 (2d Cir. 1999) (reversing denial of class certification because expert "controlled for various factors that one would expect to be relevant to the likelihood of disciplinary action and promotion"). In addition, the statistical evidence did not reference the named plaintiffs or their specific similarly-situated comparators and, accordingly, the court found that they had not established "*commonality* among these named plaintiffs' claims and the overall affected class." *Cooper*, 390 F.3d at 718 (emphasis in original).

[***25] [*636] [**291] The other evidence the appellants relied on--namely, the 37 USDA case files--arguably may have come closer to establishing commonality because it showed that the USDA often used the infeasibility of an applicant's farm plan as one reason for denying a loan. *See Garcia II*, 224 F.R.D. 8 at 14 (farm plan infeasibility given as one reason for almost half of loan rejections). Nonetheless, mindful of our limited scope of review, *see supra* at 9, we do not believe that the district court abused its discretion in denying class certification. The USDA denied loans for a variety of reasons, including inadequate farm plans and lack of funds. [12] Mem. in Response to the Court's July 15, 2003 Order with Respect to Commonality at app. 7, *Garcia v. Veneman*, No. 02-2445 (D.D.C. filed Dec. 5,

2003). The case files as well as the anecdotal evidence upon which the appellants relied showed that often the appellants were denied loans based on objective financial data. *See id.* In sum, the Department used an array of objective--and individual--justifications in denying the appellants loans. [13] Accordingly, we affirm the district court's denial of class certification of the [***26] appellants' disparate impact claim.

12 For instance, Roberto Salinas and his son jointly applied for an ownership loan in 2000 and Roberto Salinas solely applied for an operating loan in the same year. The USDA denied both loans because of the infeasibility of the farm plan as well as inadequate verification of Roberto Salinas's debt. Mem. in Response to the Court's July 15, 2003 Order with Respect to Commonality at app. 7, *Garcia v. Veneman*, No. 02-2445 (D.D.C. Dec. 5, 2003).

13 In addition to the disparate impact and treatment classes already discussed, the appellants sought certification of five subclasses. *Garcia II*, 224 F.R.D. at 15-16. The five subclasses were set forth in their proposed Third Amended Complaint, *see* JA 512-13, which the district court denied without prejudice. *Garcia II*, 224 F.R.D. at 16. Their challenge to the district court's denial of their motion to amend is supported by conclusionary assertions only, *see* Appellants' Br. at 44, and they have therefore waived the issue. *See United States v. Yeh*, 349 U.S. App. D.C. 335, 278 F.3d 9, 16 n.4 (D.C. Cir. 2002).

[***27] III.

We have jurisdiction to review, in our discretion, the district court's dismissal of the appellants' failure-to-investigate claim under ECOA and the APA pursuant to 28 U.S.C. § 1292(b). The appellants must persuade us that exceptional circumstances justify a departure from the ordinary policy of postponing appellate review until after entry of final judgment. *See United States. v. Philip Morris USA, Inc.*, 364 U.S. App. D.C. 454, 396 F.3d 1190, 1209 (D.C. Cir. 2005).

We exercise our jurisdiction over the dismissal of the ECOA failure-to-investigate claim, as we did in *Love v. Johanns*, [*637] [**292] and affirm the district court's dismissal for the same reason--the failure to investigate a discrimination complaint is not a "credit transaction" within the meaning of ECOA. *Love v. Veneman*, 439 F.3d 723, slip op. at 17-18. We decline, however, to exercise our jurisdiction regarding the appeal of the denial of the appellants' failure-to-investigate claim made under the APA. As in *Love*, the class certification issues took most of the trial court's and the parties' attention and unlike the straightforward statutory construction issue the appellants' [***28] ECOA failure-to-investigate claim presents, we think this claim will benefit from further development in the district court. [14] 439 F.3d 723, Slip Op. at 18.

14 Before us, the appellants used slightly more than four pages of their 59-page brief and no

time at oral argument addressing the APA failure-to-investigate claim.

For the foregoing reasons, we affirm the district court's denial of class certification as well as its dismissal of the failure-to-investigate claim asserted under ECOA. We dismiss the appeal of the APA failure-to-investigate claim and remand to the district court for further proceedings consistent with this opinion.

So ordered.

ROSEMARY LOVE, ET AL., APPELLANTS v. MICHAEL JOHANNS, SECRETARY, U.S. DEPARTMENT OF AGRICULTURE, APPELLEE

No. 04-5449, Consolidated with 05-5084

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

439 F.3d 723; 370 U.S. App. D.C. 96; 2006 U.S. App. LEXIS 5390; 64 Fed. R. Serv. 3d (Callaghan) 209

February 6, 2006, Argued

March 3, 2006, Decided

SUBSEQUENT HISTORY: On remand at *Love v. Connor*, 2007 U.S. Dist. LEXIS 87823 (D.D.C., Nov. 30, 2007)

PRIOR HISTORY: [***1] Appeals from the United States District Court for the District of Columbia. (No. 00cv02502).

Love v. Veneman, 224 F.R.D. 240, 2004 U.S. Dist. LEXIS 19514 (D.D.C., 2004)

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant female farmers challenged a decision from the United States District Court for the District of Columbia, which denied their motion for class certification and dismissed a discrimination and failure-to-investigate claim against defendant United States Department of Agriculture (USDA) under the Equal Credit Opportunity Act (ECOA), 15 U.S.C.S. §§ 1691-1691f, and the Administrative Procedure Act (APA).

OVERVIEW: The farmers contended that the USDA discriminated against them relating to certain loans and failed to comply with the ECOA and the APA. After class certification was denied and the case was dismissed, the farmers sought review. On appeal, the reviewing court determined that the district court did not abuse its discretion in denying class certification based on commonality. The farmers failed to "bridge the gap" between their individual claims and the "common policy" requirement. The allegations did not require the district court to infer the existence of a common policy of discrimination. The district court did not abuse its discretion by refusing to certify the first class for lack of commonality under Fed. R. Civ. P. 23(a)(2) on the diverse affidavits before it and the large number of

silent potential class plaintiffs. Moreover, the USDA did not discriminate against women across the class, even if some farmers stated a discrimination claim. The failure-to-investigate claim under the ECOA was meritless under 15 U.S.C.S. § 1691(a) because no "credit transaction" was involved. Finally, the appellate court did not review the failure-to-investigate claim as it related to the APA.

OUTCOME: The court affirmed the denial of the motion for class certification and the dismissal of the failure-to-investigate claim under the ECOA. The dismissal of the failure-to-investigation claim under the APA was remanded.

CORE TERMS: commonality, subclass, class certification, farmer, failure-to-investigate, declarants, loan application, certification, farm, discrimination claim, failure to investigate, certify, female, declarations, statistical, subjective, reviewable, matter of law, class action, abuse of discretion, statistics, putative, gender, abused, gap, gender discrimination, individual's claim, money damages, decision-making, discriminatory

COUNSEL: Marc L. Fleischaker argued the cause for appellants. With him on the briefs were Barbara S. Wahl and Kristine J. Dunne.

Pamela Coukos and Michael Foreman were on the brief of amici curiae The Impact Fund, et al. in support of appellants. Steven A. Skalet entered an appearance.

Dina R. Lassow and Paul M. Smith were on the brief of amici curiae National Women's Law Center and National Partnership for Women & Families in support of appellants.

Charles W. Scarborough, Attorney, U.S. Department of Justice, argued the cause for appellee. With him on the brief were Peter D. Keisler, Assistant Attorney General, Kenneth L. Wainstein, U.S. Attorney, and Robert M. Loeb, Attorney.

Shay Dvoretzky argued the cause for amicus curiae Chamber of Commerce of the United States of America in support of appellee. With him on the brief were Glen D. Nager, Jason J. Jarvis, and Robin S. Conrad.

JUDGES: Before: SENTELLE and HENDERSON, Circuit Judges, and EDWARDS, Senior Circuit Judge.

OPINION BY: SENTELLE

OPINION

[**97] [*724] SENTELLE, *Circuit Judge*: Rosemary Love and nine other female farmers appeal from the denial [***2] of their motion for class certification. Appellants claim, on behalf of themselves and "not less than 3,000" similarly situated women, that the United States Department of Agriculture ("USDA" or "the Department") discriminatorily administered its lending programs, and that the Department failed to process and properly investigate [*725] [**98] women's

discrimination complaints over the last quarter-century. Because we conclude the District Court did not abuse its discretion in denying the Appellants' motion for class certification and did not err in dismissing the failure-to-investigate claim, we affirm in part. However, because the Appellants' claim under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) ("APA"), remains largely unbriefed, we remand in part.

I. INTRODUCTION

The Appellants allege the USDA has engaged in a nationwide "pattern or practice" of discrimination, dating back to 1981.[1] Specifically, the Appellants' first claim - hereinafter the "discrimination claim" - is that the Department violated the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f ("ECOA" or "the Act") by employing subjective loan-making criteria, which enabled [***3] decentralized decision-makers to discriminate amongst loan applicants on the basis of gender. The Appellants' second claim - hereinafter the "failure-to-investigate claim" - is that the Department violated both ECOA and the APA by systematically dismantling its complaint-processing systems and failing to investigate discrimination claims filed by women farmers.

1 ECOA claims are generally governed by a two-year statute of limitations. *See* 15 U.S.C. § 1691e(f). However, in light of *Pigford v. Glickman*, 182 F.R.D. 341 (D. D.C. 1998), Congress retroactively extended the limitations period for certain claims, including those raised

by the Appellants. *See* Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681 (codified at 7 U.S.C. § 2279 note).

A

The USDA administers its farm loan and subsidy programs through the Farm Service Agency ("FSA").[2] The [***4] FSA makes several different types of loans, including "farm ownership" loans, which assist farmers in buying or improving farm property, 7 C.F.R. pt. 1943, "operating" loans, which provide credit and management assistance to help farmers run their farms, *id.* pt. 1941, and "emergency" loans, which help farmers resume operations after a disaster, *id.* pt. 1945. Under the USDA's regulations, a farmer seeking a farm credit or benefit must first ask the Department for a loan application, which the USDA is required to disburse. *See id.* § 1910.4(b) ("All persons requesting an application will be provided [one].").

2 Prior to January 1, 2000, the FSA was named the Farmers Home Administration. *See* 60 Fed. Reg. 23030, 23035 (1995). Throughout this opinion, we use "FSA" to refer to both entities.

After receiving an application, a farmer is then required to submit her completed application to a local county committee, the members of which are selected by other farmers from that county. [***5] *See Pigford v. Glickman*, 340 U.S. App. D.C. 420, 206

F.3d 1212, 1214 (D. C. Cir. 2000). The local county committee initially determines whether the applicant is eligible for the program, and USDA staff members ultimately grant or deny the application. *See* 7 C.F.R. §§ 1910.5, 1910.4(i). The USDA has promulgated criteria upon which the local committees are to rely in making eligibility decisions, including citizenship, legal capacity, education and farming experience, farm size, inability to obtain sufficient credit elsewhere, and "character" (which emphasizes credit history and reliability). *See id.* §§ 1941.12 (operating loan criteria), 1943.12(a) (ownership loan criteria), 764.4 (emergency loan criteria).

Any farmer who believes the USDA denied her application for a program loan or [*726] [**99] benefit on the basis of gender or any other prohibited basis may file a civil rights complaint with the Secretary of the USDA and/or the USDA's Office of Civil Rights ("OCR"). *See id.* § 15.6. The Department and/or OCR may then conduct an investigation and institute compliance proceedings, if needed. *See id.* §§ 15.8-. 10. To [***6] effectuate compliance, the Secretary may refer the matter to the Department of Justice or institute any other applicable proceedings under state or local law. *Id.* § 15.8(a).

If a farmer is dissatisfied with the USDA's response to her discrimination complaint, she may sue in federal court under ECOA. The Act makes it "unlawful for any creditor to discriminate against any applicant with respect to any aspect of a credit transaction ... on the basis of race, color, religion,

national origin, sex or marital status, or age." 15 U.S.C. § 1691(a). ECOA creates a private right of action against creditors, including the United States, who violate its anti-discrimination provisions, and it makes such creditors "liable to the aggrieved applicant for any actual damages sustained by such applicant acting either in an individual capacity or as a member of a class." *Id.* § 1691e(a). Exhaustion of administrative remedies is not required before an ECOA suit may be filed, and prevailing Appellants may recover attorney's fees. *Id.* § 1691e(d).

B

The Appellants filed a three-count complaint in the United States District Court for the District of Columbia, seeking [***7] $3 billion in money damages under ECOA, as well as both compensatory and equitable relief under the APA and the Declaratory Judgment Act, 28 U.S.C. § 2201(a). To buttress their claims, the Appellants filed 1,823 declarations, which purported to show that the Department "allowed, indeed supported, unconscionable disparate impact [through USDA's lending programs] around the country." The Appellants' statistics expert, Patrick M. O'Brien, also filed a report, which purported to provide empirical evidence of "the adverse affects [sic] of a discriminatory system." The Department moved to dismiss the complaint under FED. R. CIV. P. 12(b)(6), and the Appellants moved for class certification under FED. R. CIV. P. 23.

Before ruling on the propriety of class certification, the District Court dismissed the Appellants' failure-to-investigate claim on three grounds. First, the District Court concluded that the USDA's failure to investigate the Appellants' complaints did not constitute a "credit transaction" within the meaning of ECOA, 15 U.S.C. § 1691(a). Second, [***8] the court held the APA's "abuse of discretion" standard does not cover the USDA's failure to investigate Appellants' complaints because ECOA provided an alternative "adequate remedy." Third, the District Court concluded Appellants' claims for money damages arising from the USDA's failure to investigate their complaints are barred by the doctrine of sovereign immunity.

In light of the court's dismissal of the failure-to-investigate claim, the Appellants based their motion for class certification solely upon their discrimination claim. Accordingly, the Appellants filed an amended complaint, along with a renewed motion for certification of two subclasses. "Subclass 1" consists of female farmers who asked for loan application forms but did not receive them. "Subclass 2" consists of female farmers who received, completed, and submitted their loan application forms but did not garner a loan. The amended complaint also dropped the Appellants' demand for $ 3 billion in damages and asked [*727] [**100] only for "compensatory damages appropriate for proof at trial."

The District Court denied the Appellants' renewed motion to certify the class on three grounds. First, the court concluded that the Appellants [***9]

failed to satisfy Rule 23(a)'s commonality requirement because there had not "been a substantial showing that would permit the inference that members of the class suffered from a *common policy of discrimination* that pervaded all of the challenged decisions." Second, the court concluded that the class could not be certified under Rule 23(b)(2) because the claims for monetary relief predominated over the claims for equitable relief. Third, the court concluded the class could not be certified under Rule 23(b)(3) for the same reason it did not satisfy Rule 23(a) 's commonality requirement: The Appellants "adduced no evidence ... establishing that it is or ever was actually USDA policy to refuse to give loan application forms to women," and individual justifications for any loan denials would predominate over questions common to the putative class.

The District Court stayed the proceedings so that the Appellants could seek interlocutory review of the denial of class certification on their discrimination claim, as well as the dismissal of their failure-to-investigate claim. In our discretion, we granted the Appellants' petitions for interlocutory review of the class certification denial. [***10] We have jurisdiction over the District Court's dismissal of their failure-to-investigate claim under 28 U.S.C. § 1292(b). *See* FED. R. CIV. P. 23(f); *In re Lorazepam & Clorazepate Antitrust Litig.*, 351 U.S. App. D.C. 223, 289 F.3d 98, 105-06 (D. C. Cir. 2002). The parties (with the help of three *amici curiae*) then fully briefed and argued both issues before a merits panel. *Compare In re Veneman*, 353 U.S. App. D.C.

398, 309 F.3d 789, 791 (D. C. Cir. 2002) (denying a 23(f) petition "because the critical questions required to resolve it are entirely unbriefed").

II. DISCRIMINATION CLAIM

Appellants' first assignment of error is that the District Court erroneously declined to certify their putative class as to the "discrimination claim." To justify class certification, Appellants must first satisfy four threshold requirements, demonstrating that:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of [***11] the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a). If all four prerequisites under Rule 23(a) are met, then Appellants must also show that their claims fit within one of the subsections of Rule 23(b). *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613-16, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997). Rules 23(b)(2) and (b)(3) - the two subsections at issue in this case - have different requirements depending primarily on the nature of the relief sought: Certification under the former is appropriate where a class seeks declaratory or injunctive relief, while certification under the latter is appropriate where, *inter alia*, the "'final relief

relates exclusively or predominantly to money damages.'" *In re Veneman*, 309 F.3d at 792 (quoting FED. R. CIV. P. 23(b)(2) advisory committee notes).

The District Court declined to certify the class because the Appellants failed to show "commonality" under Rule 23(a)(2), and they failed to meet the requirements of Rule 23(b)(2) or 23(b)(3). Because we conclude [***12] the District Court neither erred as a matter of law nor abused its discretion [*728] [**101] in finding the putative class members lack "commonality" under Rule 23(a)(2), we affirm without considering whether certification would also be improper under Rule 23(b).

A

Appellants argue that the District Court erred by failing to find commonality within Subclass 1 under Rule 23(a)(2). We review the District Court's decision for abuse of discretion. *See Hartman v. Duffey*, 305 U.S. App. D.C. 256, 19 F.3d 1459, 1471 (D. C. Cir. 1994); *Wagner v. Taylor*, 266 U.S. App. D.C. 414, 836 F.2d 578, 586 (D. C. Cir. 1987).

Each member of Subclass 1 allegedly requested an application for a farm loan and had her request denied. Although the District Court recognized that "plaintiffs have assembled an impressive collection of sworn statements asserting that a great many women have been flatly refused ... loan application forms," it nonetheless declined to certify Subclass 1. The court noted that the Appellants' declarations "might have been sufficient to support certification of subclasses of women who

suffered discrimination at the hands of particular county committees," but variations [***13] between the declarations precluded a finding of "commonality" for purposes of a nationwide class action.

The Appellants concede that the Department offered varying reasons for denying their requests, but Appellants argue these variations are irrelevant "because there is no basis for refusing to distribute loan applications to requestors, pursuant to USDA's own regulations." *See* 7 C.F.R. § 1910.4(b) ("All persons requesting an application will be provided [one]."). Appellants further concede that they have no statistical proof that women's requests for loan applications were treated differently from men's. Nevertheless, Appellants assert that a mountain of anecdotes proves that their claims are "not mere coincidence." In the absence of any data to the contrary, the Appellants claim, the District Court should have presumed that 622 aggrieved women's declarations warranted the certification of the class.

We disagree. As we have previously noted:

> There is more to a showing of commonality than a demonstration that class plaintiffs suffered discrimination on the basis of membership in a particular group. ... While in a case alleging intentional discrimination, [***14] such as this one, a plaintiff need not isolate the particular practice and prove that such practice *caused* the discrimination, plaintiffs must make a significant

> showing to permit the court to infer that members of the class suffered from a common policy of discrimination that pervaded all of the employer's challenged employment decisions.

Hartman, 19 F.3d at 1472 (emphasis in original). Thus, commonality under Rule 23(a) requires a named plaintiff to show (i) discrimination (ii) against a particular group (iii) of which the plaintiff is a member, *plus* (iv) some additional factor that "permits the court to infer that members of the class suffered from a common policy of discrimination." *Id.* *Hartman's* "common policy" requirement is consistent with the Supreme Court's teaching in *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982). There the Court noted:

> Conceptually, there is a wide gap between (a) an individual's claim that he has been [discriminated against], and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class [***15] of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims [*729] [**102] will share common questions of law or fact .... For respondent to bridge that gap, he must prove much more than the validity of his own claim.

Id. at 157-58.

The District Court did not abuse its discretion in concluding that Appellants failed to "bridge the gap" between their individual claims and *Hartman's* "common policy" requirement. Some members of Subclass 1 (namely, the 622 declarants) offered anecdotal evidence that they were personally denied loan applications, and some of those same women reported discriminatory treatment by USDA officials. For example, the declarants allege that USDA officials told them "they were too early to apply for a loan, too late to apply for a loan, that they need not bother filling out an application because they were not eligible to receive a loan, or that their husbands should apply." Appellants' Br. at 11. Certainly these allegations may give the declarants standing to bring *individual* suits. However, the declarants' allegations did not require the District Court to infer the existence of a "common [***16] policy of discrimination" that affected the *non*-declarants, as well. The bald allegation that the declarants and non-declarants alike are unified by a "common policy" of gender discrimination is insufficient to show the District Court abused its discretion under *Hartman* and *Falcon*.

As the Appellants candidly admit, there is no evidence that women were more likely than men to be refused loan applications. *See* Appellants' Br. at 13. Moreover, the declarants' anecdotal accounts differ widely, and their complaints of discrimination are interspersed with nondiscriminatory evidence and innocuous explanations. *Compare* Joint Appendix ("J. A.") 538 ("I was told there were no funds available."), *and* J.A. 540 ("I was told that

there were no funds or applications available."), *with* J.A. 536 (A USDA official "told me that farming business was too risky for women."). Thus, even taking as true all of the declarants' factual allegations, the District Court was nevertheless left to wonder whether some of the declarants (to say nothing of the silent, non-declarants) were victimized by gender discrimination. Because the Appellants failed to "bridge the gap" between their [***17] individual and class-wide claims, we cannot fault the District Court for refusing to take a leap of faith.

A recent case from the Sixth Circuit illustrates our point. In Reeb v. Ohio Dep't of Rehab. & Corr., Belmont Corr. Inst., 435 F.3d 639, 2006 WL 162836 (6th Cir. Jan. 24, 2006), four female prison guards filed a putative class action against their employer, alleging it violated Title VII by treating them differently from the male guards. Seeking to represent all past and present female employees at the prison, the named plaintiffs claimed to have been the victim of the defendant's "general policy" of discrimination on the basis of sex. The district court certified the class and found Rule 23(a) 's commonality requirement met "because the issue of whether the Defendant violated Title VII will be common to the class." 435 F.3d 639, [WL] at *5 (internal quotation marks and citation omitted). The appeals court reversed for an abuse of discretion because "if this were the test, every plaintiff seeking to certify a class in a Title VII action would be entitled to that certification." *Id.; see also Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565, 571 (6th Cir. 2004) ("Conclusory [***18] allegations and general

assertions of discrimination are not sufficient to establish commonality." (citing *Falcon*, 457 U.S. at 157)); *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998) ("It is not every common question that will suffice [to show commonality], however; at a sufficiently abstract level of generalization, almost [*730] [**103] any set of claims can be said to display commonality. What we are looking for is a common issue the resolution of which will advance the litigation.").

After conducting a "rigorous analysis" of the Appellants' claims under Rule 23(a), *Hartman*, 19 F.3d at 1473, the District Court in this case exercised its considered judgment and concluded that class certification would not advance the litigation. *Cf. Pigford v. Glickman*, 185 F.R.D. 82 (D. D.C. 1999) (chronicling the arduous process of handling a similar case as a class action). Even if Subclass 1 were certified, the District Court concluded, the outcome of this case would nevertheless turn on a series of individualized inquiries into application-distribution practices in more than 2,700 FSA offices across the country over the last [***19] quarter-century. Unlike the *Reeb* court, we need not consider whether the contrary conclusion would have constituted an abuse of discretion. For present purposes, it is sufficient to note that while it might not be reversible error to certify a subclass under these or similar circumstances, *see Chiang v. Veneman*, 385 F.3d 256, 265-66 (3d Cir. 2004) (affirming the certification of a class akin to Subclass 1), it is also not an abuse of discretion for the District Court to refuse to do so, *see Eubanks v. Billington*,

324 U.S. App. D.C. 41, 110 F.3d 87, 96 (D. C. Cir. 1997).

We hasten to emphasize that we do not hold that anecdotal evidence alone is inherently insufficient to justify class certification. In this case, however, the District Court did not abuse its discretion by refusing to certify Subclass 1 for lack of commonality under Rule 23(a)(2) on the diverse affidavits before it, and the large number of silent, potential class plaintiffs. As a result, we have no occasion to consider the District Court's alternative holdings under Rule 23(b). [3] *See Amchem*, 521 U.S. at 613-14.

> 3 Even were we to consider Rule 23(b), the similar lack of "generally applicable grounds" under (b)(2) and "predominance" under (b)(3) would doom the certification. *See* pp. 7-8, *supra*.

[***20] B

Appellants mount a two-prong challenge to the District Court's analysis of Subclass 2, which comprises women applicants who were allegedly denied farm loans on the basis of their gender. The District Court concluded that the geographic dispersal and decentralized organization of the USDA's loan offices "cut[] against any inference for class action commonality." Moreover, the court noted that the Department offered a wide array of objective, highly individualized justifications (such as the "failure to meet collateral requirements, poor credit, [and] insufficient income") for denying the

Appellants' loan requests. Appellants first claim the District Court erred as a matter of law. Second, Appellants claim the District Court abused its discretion by ignoring the facts. We address (and reject) each claim in turn.

1

Appellants argue that the District Court erred as a matter of law in its evaluation of commonality within Subclass 2. In Appellants' view, "the District Court created its own entirely new standard for determining how subjective a system must be in order to demonstrate a common policy of discrimination." Appellants argue that Subclass 2 is unified by the USDA's policy [***21] of delegating standardless discretion to local loan-making officers, and "this Court" has held that "a common policy [of discrimination] exists when significantly subjective decision-making operates on a national basis with discriminatory results." [*731] [**104] Accordingly, Appellants criticize "the District Court's substitution" of its own legal standard - which Appellants dub a "subjectivity spectrum" - "in lieu of well-established precedent." Our review of the question of law is de novo. *See, e.g., Gov't of Rwanda v. Johnson*, 366 U.S. App. D.C. 98, 409 F.3d 368, 372 (D. C. Cir. 2005).

Appellants are wrong about the law of "this Court." We have never held that subjective decision-making processes require a district court to find commonality for purposes of class certification. *See, e.g., Hartman*, 305 U.S. App. D.C. 256, 19 F.3d 1459

at 1472 (holding plaintiffs' challenge to the defendant's "subjective" decision-making did not warrant a finding of commonality: "While plaintiffs' statistics may have demonstrated that discrimination against women applicants to the six [] job categories was afoot, nothing in the record so far permits the additional inference [***22] that class members suffered a *common* injury." (emphasis in original)); *see also Wagner*, 836 F.2d at 594-95. The District Court's application of *Hartman* was not erroneous as a matter of law.

2

Appellants next argue that the District Court abused its discretion by failing to properly consider evidence of commonality within Subclass 2. Appellants rely on 859 declarations from disappointed female loan applicants, who "attested that they were denied loans based upon their gender." However, by the Appellants' own count, 41% of these declarants have no idea why their loan applications were denied. *See* Appellants' Br. at 21 (asserting that 27% received "no official written response" to their loan applications, while an additional 14% received "the equivalent of no response"). The District Court was well within the bounds of its discretion to find a lack of commonality where two out of every five of the Appellants' own declarants - to say nothing of the silent non-declarants - would be forced to prove at trial that individual reasons for their loan denials were not pretextual (*e.g.*, one woman had poor credit, another had no collateral, a third was victimized [***23] by

gender discrimination, etc.). For the same reasons that justified the District Court's conclusion that Subclass 1 does not exhibit "commonality," the record in this case does not compel the conclusion that the USDA discriminated against women *across the class*, even if some *individual* declarants in Subclass 2 properly stated a discrimination claim. *See Hartman*, 19 F.3d at 1472.

Appellants' efforts to demonstrate commonality through rudimentary statistics are equally unavailing. Appellants' statistics expert, Patrick O'Brien, admits that his analysis does not account for the possibility that women receive fewer loans because they apply for fewer loans, and he recognizes that women may receive smaller loans because they operate smaller farms. Moreover, there are countless other, non-discriminatory explanations for any patterns in the USDA's lending data. For example, women may have relatively less credit than men; women may have relatively less wealth than men; or women may apply for loans at a younger - and thus riskier - age than men. Instead of conducting a relatively simple statistical analysis (such as a multiple regression) to control for any or all [***24] of these variables, O'Brien simply reported a series of elementary cross-tabulations, from which it is impossible - as a statistical matter - to draw meaningful conclusions. *See, e.g.*, WILLIAM H. GREENE, ECONOMETRIC ANALYSIS 100-01, 147-60 (4th ed. 2000); Frank T. Denton, *The Significance of Significance: Rhetorical Aspects of Statistical Hypothesis Testing in Economics, in* THE CONSEQUENCES OF ECONOMIC RHETORIC 163

(Arjo [*732] [**105] Klamer, Donald N. McCloskey & Robert M. Solow eds., 1988). The Appellants' expert concedes that "no statistical tests for significance were done" on his data. *Compare Bazemore v. Friday*, 478 U.S. 385, 399 n. 9, 106 S. Ct. 3000, 92 L. Ed. 2d 315 (1986) (holding the Appellants' empirical evidence of discrimination was admissible to show disparate treatment because it showed "statistically significant" disparities).

Given the numerous shortcomings in the Appellants' efforts to show commonality within Subclass 2, the District Court did not abuse its discretion in denying the Appellants' certification motion under Rule 23(a)(2). Accordingly, we have no occasion to consider the District Court's alternative holdings under Rule 23(b). *See Amchem*, 521 U.S. at 613-14. [***25]

III. FAILURE-TO-INVESTIGATE CLAIM

Appellants' final argument is that the District Court erred in dismissing their "failure-to-investigate" claim prior to ruling on their motion for class certification. The District Court concluded the USDA's alleged failure to investigate Appellants' complaints is not reviewable under ECOA, which makes it "unlawful for any creditor to discriminate against any applicant with respect to any aspect of a *credit transaction*" on the basis of sex. 15 U.S.C. § 1691(a) (emphasis added). The court concluded, as a matter "of course," that a failure to investigate does not fit within the plain meaning of a "credit transaction." The District Court further concluded that Appellants' failure-to-investigate claim is not

reviewable under the APA because ECOA provides an adequate alternative remedy. *See* 5 U.S.C. § 704 (limiting the applicability of the APA to a "final agency action for which there is no other adequate remedy in a court").

Appellants argue the District Court erred under both ECOA and the APA. First, the Appellants urge us to construe liberally the meaning of a "credit transaction" under 15 U.S.C. § 1691(a) [***26] and to hold their failure-to-investigate claim is reviewable under ECOA. Alternatively, the Appellants argue their claim is reviewable under the APA because the USDA's regulations empower aggrieved applicants to file discrimination claims, which the Department is legally obligated to investigate. Our review is de novo. *See, e.g., Johnson*, 409 F.3d at 372.

We first reject the Appellants' argument under ECOA because even a liberal interpretation of "credit transaction" does not encompass "failure to investigate a discrimination complaint." *Cf. Bissette v. Colonial Mortgage Corp. of D. C.*, 155 U.S. App. D.C. 360, 477 F.2d 1245, 1247 (D. C. Cir. 1973) (noting "'liberal construction' and interpretation based on legislative purpose can only go so far. Where the meaning of the statute and regulations is clear, a contrary reading would become destruction of the statutory scheme."). True, the phrase "credit transaction" is not without ambiguity, but it is not a normal understanding of those words in the English language that they would include the failure to investigate complaints of discrimination in an underlying event even if the underlying event falls

[***27] within the meaning of the phrase "credit transaction."

Again, there is a certain ambiguity in the term. The Department has gone to the trouble of issuing a defining regulation. *See* 12 C.F.R. § 202.2(m). The regulatory scheme of which that is a part may become the stuff of APA litigation upon remand, but so far as an action at law based on this section of the ECOA, that simply is not within the plain meaning of the statute.

This leaves the Appellants' claim that the USDA's failures to investigate [*733] [**106] discrimination claims are reviewable under the APA for another day. We follow this course of nonaction because the record is little developed on that argument, and the parties' briefs have given short-shrift to the issue before us. As our review of this claim is discretionary in the first place, and as the order certifying the 12(b)(6) ruling for interlocutory review was without prejudice to further decision by the merits panel of this court, we decline to exercise our discretion and remand the APA claim for further proceedings in the District Court. *See In re Veneman*, 309 F.3d at 796.

CONCLUSION

For the reasons stated above, the District Court's [***28] denial of the Appellants' motion for class certification is affirmed. The District Court's dismissal of the Appellants' failure-to-investigate claim under ECOA is affirmed, but its dismissal of

the Appellants' failure-to-investigate claim under the APA is remanded.

So ordered.

HOnly the Westlaw citation is currently available.

United States District Court, District of Columbia.
Guadalupe L. GARCIA, et al., Plaintiffs,
v.
Ann V. VENEMAN, Secretary, United States Department of Agriculture, Defendant.
No. Civ.A. 00-2445(JR).

March 20, 2002.

Alexander J. Pires, Jr., Conlon, Frantz, Phelan & Pires, LLP, Washington, DC, Phillip L. Fraas, Hogan & Hartson, LLP, Washington, DC, Alan M. Wiseman, Stephen S. Hill, Howrey Simon Arnold & White, LLP, Washington, DC, for Plaintiff.

Jean Lin, U.S. Department of Justice, Civil Division, Federal Programs Branch, Washington, DC, for Defendant.

MEMORANDUM ORDER

ROBERTSON, J.

*1 Plaintiffs are Hispanic farmers who complain of discrimination in the administration of U.S. Department of Agriculture loan and disaster benefit programs.[FN1] The government moves to dismiss under Fed.R.Civ.P. 12(b)(1) and 12(b)(6), arguing that the Court lacks jurisdiction over several claims and that plaintiffs have failed to allege a cognizable claim under the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691 *et seq.*, the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*, or the

Declaratory Judgment Act, 28 U.S.C. §§ 2201 *et seq.* For the reasons set forth below and in *Love v. Veneman,* Civ. No. 00-2502, mem. op. (D.D.C. Dec. 13, 2001), the motion will denied in part and granted in part.

> FN1. The ten named plaintiffs also sue on behalf of others similarly situated, including 92 individuals named but not described in the second amended complaint. The plaintiffs' motion for class certification and the government's motion to strike class action allegations and to dismiss the putative class members are in abeyance pending further briefing by the parties.

Background

This case is one of a number of class actions filed by minority and women farmers in the wake of several reports documenting discriminatory practices in local USDA offices and the dismantling of the Department's civil rights enforcement program in the early 1980s. In 1998, concerned that farmers had relied to their detriment upon USDA's (inoperative) internal mechanisms to investigate their discrimination complaints, Congress extended the statute of limitations until October 21, 2000, to allow farmers who had filed administrative complaints concerning USDA discrimination between 1981 and 1996 to bring suit in U.S. District Court. 7 U.S.C. § 2279 Note. USDA has settled a class action filed on behalf of African American farmers, *Pigford v. Glickman,* 185 F.R.D. 82 (D.D.C.1999), *aff'd,* 206

F.3d 1212 (D.C.Cir.2000). This action by Hispanic farmers, however, as well as suits by Native American farmers, *Keepseagle v. Veneman,* Civ. No. 99-3119, and female farmers, *Love v. Veneman,* Civ. No. 00-2502, continue in litigation.

The *Garcia* plaintiffs allege that from January 1, 1981, to the present, the Farmers Home Administration and its successor, the Farm Service Agency, discriminated against Hispanic farmers and ranchers in awarding disaster benefits and operating, farm ownership, and emergency loans. They also allege that the USDA acted arbitrarily in failing to investigate and resolve their discrimination complaints.

Analysis

The government's motion to dismiss raises the same legal arguments advanced in its motion to dismiss in *Love v. Veneman.* For the reasons set forth in a memorandum issued in the *Love* case on Dec. 13, 2001, (1) the *Garcia* plaintiffs are entitled to bring ECOA claims for discrimination in lending transactions without administrative exhaustion; (2) at least some of the named plaintiffs' lending claims satisfy the statute of limitations;[FN2] and (3) plaintiffs' allegations of failure to investigate civil rights complaints do not state claims under ECOA or the APA.

FN2. Plaintiffs Guadalupe Garcia and Gloria Moralez satisfied the special statute of limitations for USDA claims by bringing suit on "eligible [administrative] complaints" that they had filed prior

to July 1, 1997, asserting discrimination in USDA lending and disaster benefit programs between 1981 and 1996. Agricultural, Rural Development, Food and Drug Administration, and Related Agencies Appropriation Act, 1999, Pub.L. 105-277, § 741, 112 Stat. 2681-30 (codified at 7 U.S.C. § 2279 Note). However, Mr. Garcia's "eligible complaint" only appears to have concerned his 1986 loan application. The plaintiffs' second amended complaint does not describe any discrimination complaint meeting the requirements of 7 U.S.C. § 2279 as having been filed concerning his 1988 and 1994 credit applications, so those claims are now time barred.

> It is unclear from the face of the complaint whether Tony and Patricia Jimenez, Beatrice and Rodolfo Garza, and Edward and Normal Flores filed complaints within the USDA that specifically asserted discrimination as required by 7 U.S.C. § 2279 Note. *Love v. Veneman,* Civ. No. 00-2502, mem. op. at 10-12. It is also unclear whether Mr. Garcia, Mr. and Mrs. Jimenez, and Larry and Robert Chavarria meet ECOA's general two-year statute of limitations as to their claims based on 1998 credit transactions. 15 U.S.C. § 1691e(f). Since the special statute of limitations does not apply to USDA discrimination after 1996 or administrative complaints filed after July 1, 1997, the 1998 claims are barred unless they concern transactions

> occurring within two years of the filing of this action on October 13, 2000. Because 12(b)(1) motions must be generously construed in the plaintiffs' favor, the motion to dismiss these plaintiffs will be denied at this time. *Love v. Veneman*, Civ. No. 00-2502, mem. op. at 12 & n. 8. However, the government is free to renew its motion if these plaintiffs cannot demonstrate that they satisfy the statute of limitation requirements.

The only legal issue requiring further discussion arises from plaintiffs' claims for discriminatory administration of disaster benefit programs.[FN3] A disaster benefit decision is not a "credit transaction" within the meaning of ECOA. 15 U.S.C. § 1691(a). A final agency action denying a disaster benefit is, however, reviewable under the Administrative Procedure Act, 5 U.S.C. §§ 702, 704. Plaintiff Gloria Moralez asserts that she was denied disaster benefit payments for losses to her grape crop in 1993 and that she filed a discrimination complaint with the USDA prior to July 1, 1997, concerning that denial. Although the effectiveness of APA relief is questionable-the APA does not waive the government's sovereign immunity with regard to money damages, 5 U.S.C. § 702-Ms. Moralez has satisfied the special statute of limitations approved by Congress and has standing to assert her claim before this court. 7 U.S.C. § 2279 Note.

> FN3. Such claims were dismissed in *Love* because the only named plaintiff

> who alleged the unlawful denial of disaster benefits was successful on her administrative appeal. *Love v. Veneman,* Civ. No. 00-2502, mem. op. at 13.

*2 It is accordingly this *20th* day of March 2002,

ORDERED that defendant's motion to dismiss [# 5] is denied in part and granted in part. And it is

FURTHER ORDERED that plaintiffs' motion to for leave to file a second amended complaint [# 16, # 19] is granted. And it is

FURTHER ORDERED that defendant's motion to strike plaintiffs' motion to certify the class [# 21] is denied. And it is

FURTHER ORDERED that plaintiffs' motion to strike defendant's notice of filing [# 33, # 34] is granted. And it is

FURTHER ORDERED that the Court's order of January 23, 2001[# 14] is modified as described in open court on February 21, 2002, to permit further briefing on the motions to certify a class [# 18] and to strike class action allegations [# 5].

D.D.C.,2002.
Garcia v. Veneman
Not Reported in F.Supp.2d, 2002 WL 33004124 (D.D.C.)

END OF DOCUMENT

GUADALUPE L. GARCIA, et al., Plaintiffs, v. ANN V. VENEMAN, Secretary, United States Department of Agriculture, Defendant.

Civil Action No. 00-2445 (JR)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

211 F.R.D. 15; 2002 U.S. Dist. LEXIS 24113

December 2, 2002, Decided

SUBSEQUENT HISTORY: Class certification denied by, Motion to strike denied by, Motion denied by, Stay granted by Garcia v. Veneman, 2004 U.S. Dist. LEXIS 18400 (D.D.C., Sept. 10, 2004)

DISPOSITION: Plaintiffs' motion for class certification denied.

COUNSEL: [**1] For Guadalupe L Garcia, Tony Jiminez, Patricia Jiminez, Mr X, Mrs X, PLAINTIFFS: Alexander John Pires, Jr, Conlon, Frantz, Phelan & Pires, Washington DC, USA.

For All Plaintiffs, PLAINTIFF: Alan Mitchell Wiseman, Howery Simon Arnold & White, Washington DC, USA.

For Dan Glickman, FEDERAL DEFENDANT: Lisa Ann Olson, US Department of Justice, Washington DC, USA. Jean Lin, US Department of Justice Civil Division, Federal Programs Branch, Washington DC, USA.

For Ann V Veneman, FEDERAL DEFENDANT: Lisa Ann Olson, US Department of Justice, Washington DC, USA.

For Gloria Moralez, Beatrice Garcia, Rodolfo Garza, Larry Chavarria, Robert Chavarria, Ysidoro F Mendoza, Alberto A Acosta, Jimmy Alvarez, Elizabeth Alvarez, David Flores, Patrick R Flores, Gilbert A Garcia, F Richard Llanez, Edwardo R Lopez, Ismael O Medina, Sonja Meyers, Robert Ortega, Jr, Edward W Provencio, George L Provencio, Alex Contreras, Joe Contreras, Louis Contreras, Hector T Flores, Juan J Flores, Alberto M Ortega, Rene Ortega, Ruperto R Rodriguez, Erasmo Valdez, Dionicio Valdezz, II, Arturo Vasquez, Rodolfo Vasquez, David L Hinojosa, Sr, PLAINTIFFS: Phillip L Fraas, Washington DC, USA.

JUDGES: JAMES ROBERTSON, [**2] United States District Judge.

OPINION BY: JAMES ROBERTSON

OPINION

[*17] **MEMORANDUM**

Plaintiffs are ten Hispanic farmers who complain of discrimination in the administration of U.S. Department of Agriculture (USDA) loan and disaster benefit pro-grams. The named plaintiffs also sue on behalf of others similarly situated, including 92 individuals named but not described in their second amended complaint. Before the Court is plaintiffs' motion for class certification. The motion

has been extensively briefed, but plaintiffs have yet to establish that there are questions of law or fact common to the class or that such questions predominate over any questions affecting only individual members. The motion must therefore be denied.

Background

This is one of a number of suits filed as class actions by minority and women farmers in the wake of reports documenting discriminatory practices in local USDA offices and the dismantling of the USDA's civil rights enforcement program in the early 1980s. In 1998, concerned that farmers had relied to their detriment upon USDA's (inoperative) internal mechanisms to investigate their discrimination complaints, Congress extended the statute of limitations for [**3] filing complaints under the Equal Credit Opportunity Act, 15 U.S.C. § 1691 et seq., until October 21, 2000, to allow farmers who had filed administrative complaints concerning USDA discrimination between 1981 and 1996 to bring suit in U.S. District Court. See Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, Div. A § 101(a), § 741, 112 Stat. 2681 (Oct. 21, 1998) (codified at 7 U.S.C. § 2279 Notes). A number of class actions were filed just before the end of the extended period of limitations. USDA has settled a class action filed on behalf of African American farmers, Pigford v. Glickman, 185 F.R.D. 82 (D.D.C. 1999), aff'd, 340 U.S. App. D.C. 420, 206 F.3d 1212 (D.C. Cir. 2000). This action by Hispanic farmers, however, as well as suits by Native American

farmers, Keepseagle v. Vene-man, Civ. No. 99-3119, and female farmers, Love v. Veneman, Civ. No. 00-2502, continue in litigation.

The Garcia plaintiffs allege that, from January 1, 1981, to the present, the Farmers Home Administration and its successor, the Farm Service Agency, discriminated against Hispanic [**4] farmers and ranchers in making operating loans, farm ownership loans, and emergency loans, and in awarding disaster benefits. They also allege that the USDA acted unlawfully in failing to investigate and resolve the discrimination complaints they filed.

The Farm Service Agency (FSA) administers various farm loan and subsidy programs. FSA is the product of the 1994 merger of the Farmers Home Administration (FmHA) (which directly made and guaranteed loans to farmers) and the Agricultural Stabilization and Conservation Service (ASCS) (which provided such services to farmers under commodity, price support, CRP, disaster payment programs, and related services to stabilize farm income and prices, and to assist in the conservation of land). The individual farmer's point of contact with FSA, and with FmHA and ASCS before it, was at the county office level. County committees, comprised of local farmers, reviewed and decided whether or not to approve loan requests.

Procedural Background

This suit was filed on October 13, 2000, eight days before the expiration of the extended statute of limitations. It was assigned to Judge Louis F.

Oberdorfer, transferred to Judge Royce C. Lamberth, and [**5] transferred again, on February 1, 2002, to me. On March 20, 2002, I ruled on defendant's motion to dismiss, holding (1) that the Garcia plaintiffs were entitled to bring Equal Credit Opportunity Act (ECOA) claims for discrimination in lending transactions without administrative exhaustion; (2) that at least some of the named plain-tiffs' lending claims had been filed within the extended limitations period; and (3) that plaintiffs' allegations of failure to investigate civil rights complaints did not state claims under ECOA or the Administrative Procedure Act.

The motion now before the Court seeks certification of a class defined as:

> [*18] All Hispanic farmers and ranchers who farmed or ranched or attempted to do so and who were discriminated against on the basis of national origin or ethnicity in obtaining loans, including the servicing and continuation of loans, or in participating in disaster benefit programs administered in the United States Department of Agriculture, during the period from January 1, 1981 through December 31, 1996, and timely complained about such treatment, or who experienced such discrimination from the period of October 13, 1998 through the present.

[**6] Analysis

Standards for class certification

Proponents of a class action must first satisfy the prerequisites of Fed.R.Civ.P. 23(a):

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative party will fairly and adequately protect the interests of the class.

If those requirements of numerosity, commonality, typicality, and adequacy of representation are met, the class action must also fit one of three subsections of Rule 23(b), the second and third of which are pertinent to this case:

> An action may be maintained as a class action if...(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or (3) the court finds that the questions of law or fact common to the members [**7] of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Fed.R.Civ.P. 23(b).

The proponents of a class action have the burden of proof as to each of Rule 23's requirements. See McCarthy v. Kleindienst, 239 U.S. App. D.C. 247, 741 F.2d 1406, 1414 n.9 (D.C. Cir. 1984). If necessary, in deciding whether movants have met their burden, the Court may "probe behind the pleadings before coming to rest on the certification question." Gen. Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 160, 72 L. Ed. 2d 740, 102 S. Ct. 2364 (1982).

Rule 23(a) Analysis

Numerosity and Adequacy of Representation

Plaintiffs' showing of numerosity and adequacy of representation is not seriously contested. The Second Amended Complaint names 98 plaintiffs; counsel represent that 179 more Hispanic farmers have signed retainer agreements; and plaintiffs estimate that their class could reach 20,000 people. Whether 20,000 is a reasonable estimate or not, 277 plaintiffs is easily a high enough number to satisfy the numerosity requirement. See, e.g., In re Pepco Employment Litig., 1992 U.S. Dist. LEXIS 18648, Civ. No. 86-0603, 1992 WL 442759, at *4 (D.D.C. Dec. 4, 1992) [**8] ("As a general rule...a pro-posed class of at least 40 members will satisfy this requirement").

As for adequacy of representation, the qualifications of plaintiffs' counsel are conceded. Opposition at 28. Defendant does suggest that the facts underlying the claims of the class representatives are not typical so that a "conflict of

interest" might arise. That conflict was not further described, see Opposition at 27-28, but resolution of the issue is unnecessary to the disposition of this motion.

Commonality and Typicality [1]

1 In class certification analyses generally, and certainly in this one, the "commonality and typicality requirements tend to merge." Falcon, 457 U.S. at 158 n.13; Wagner v. Taylor, 266 U.S. App. D.C. 414, 836 F.2d 578, 590 n.77 (D.C. Cir. 1987). The following analysis, written in terms of commonality, applies fully to the typicality element as well.

"There is more to a showing of commonality than a demonstration that class [*19] plaintiffs suffered [**9] discrimination on the basis of membership in a particular group....plaintiffs must make a *significant showing* to permit the court to infer that members of the class suffered from a common policy of discrimination that pervaded all of the employer's challenged employment decisions." Hartman v. Duffey, 305 U.S. App. D.C. 256, 19 F.3d 1459, 1472 (D.C. Cir. 1994) (emphasis added). Plaintiffs have failed to make that "significant showing" in this case.

The commonality requirement is critical to a Rule 23(a) determination. In this case, plaintiffs make two central assertions to support their commonality claim: 1) that all of the putative class members were injured by a systemic USDA failure to investigate discrimination complaints made by

Hispanic farmers who applied for loans or disaster relief benefits; and 2) that USDA loan and benefit programs were controlled by "local groups of white men who exercised unfettered discretion in applying highly subjective standards to discriminate against Hispanic and other minority farmers and ranchers." Plaintiffs' Supplemental Memorandum in Support of their Motion for Class Certification ("Supplemental Memorandum") at 34. On the basis of those two assertions, [**10] plus statistical evidence showing that His-panic farmers have received disproportionately fewer USDA loans than white farmers, plaintiffs argue that they have sustained their burden of establishing the commonality and typicality elements that are crucial to class certification.

The first of those two assertions -- as to the USDA's failure to investigate discrimination complaints -- cannot serve as the common issue of fact necessary to a Rule 23(a) determination, after my ruling on March 20, 2002, that plaintiffs' allegations of failure to investigate civil rights complaints did not state a claim under the Equal Credit Opportunity Act or the Administrative Procedure Act 2. What remains to establish commonality, then, is the allegation of a subjective decision-making process with discriminatory results.

2 That ruling separates this case from Pigford v. Glickman, 182 F.R.D. 341, 348 (D.D.C. 1998) and Keepseagle v. Veneman, Civ. No. 99-03119, Memorandum Opinion and Order at 19-20 (D.D.C. Dec. 11, 2001), in which Judges Paul L. Friedman and Emmet G. Sullivan based

their class certification decisions at least partly on common issues of law and fact arising from USDA's failure to process and investigate discrimination complaints.

Consideration of the merits of plaintiffs' case is generally inappropriate at the class certification stage, see Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974), and see In re Veneman, 309 F.3d 789, 2002 WL 31414127, at *4 (D.C. Cir. 2002) (where the Court of Appeals recently waved off the government's argument that the Keepseagle plaintiffs have no viable ECOA claim by stating that the argument has "no bearing on the question of class certification"). A court may certainly decide dispositive motions prior to determining whether the case can be maintained as a class action, however. See Curtin v. United Airlines, Inc., 348 U.S. App. D.C. 309, 275 F.3d 88, 92 (D.C. Cir. 2001); Telfair v. First Union Mortgage Corp., 216 F.3d 1333, 1343 (11th Cir. 2000); Cowen v. Bank United of Tex., 70 F.3d 937, 941 (7th Cir. 1995); Wright v. Schock, 742 F.2d 541, 543-44 (9th Cir. 1984). Once the court disposes of a claim, the court need not consider the disposed-of claim as a basis for class certification. See Thompson v. County of Medina, Ohio, 29 F.3d 238, 241 (6th Cir. 1994) ("We find that the district court did not abuse its discretion in refusing to certify a class as to the issues disposed of on summary judgment").

[**11] Before the Supreme Court rejected the 'across-the-board' rule that many courts had been using to certify class actions in employment discrimination cases, see [*20] Falcon, 457 U.S. at

157-58, such a premise may well have been sufficient for class certification. In Falcon, the Court observed that:

> Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims. For respondent to bridge that gap, he must prove much more than the validity of his own claim.

Falcon, 457 U.S. at 157-58 (footnote omitted). In a foot-note to that opinion, however, the Court speculated that "significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if [**12] the discrimination manifested itself in hiring and promotion practices in the same general fashion, *such as through entirely subjective decision-making processes*." Id. at 159 n.15 (emphasis added); see Wagner v. Taylor, 266 U.S. App. D.C. 414, 836 F.2d 578, 589 (D.C. Cir. 1987).

Plaintiffs rely heavily on Falcon's footnote 15. They argue that the very subjectivity of the USDA's county committee decision-making process, when considered with the statistical results of that process, is enough of a showing to support the certification of

a class of plain-tiffs making both disparate treatment and disparate impact claims 3.

> 3 Both of these theories must be kept in mind when considering the class certification question, because "'to answer the procedural questions [of Rule 23]...in effect requires answering the substantive question whether, under either of the available theories, there exists the requisite 'pat-tern or practice' sufficiently and comparably affecting an identifiable class of protected employees.'" See Wagner, 836 F.2d at 587 n.60 (quoting Stastny v. S. Bell Tel. & Tel. Co., 628 F.2d 267, 274 (4th Cir. 1980)).

[**13] The first, and most obvious, problem with this argument is its characterization of the decision-making process used in connection with USDA loan and benefit applications as "highly subjective." Falcon's note 15 suggests that an "entirely subjective" process might "conceivably" justify class certification. Falcon, 457 U.S. at 159 n.15. Slavish adherence to the word "entirely" would be unwise, but where, as here, a number of objective factors guide the decision-making process, the proposed class fits less neatly into the Falcon exception. See Vuyanich v. Republic Nat'l Bank of Dallas, 723 F.2d 1195, 1199-200 (5th Cir. 1984) ("The district court's finding that the Bank relied on two objective inputs -- education and experience -- in its necessarily subjective hiring process...precludes reliance on this 'general policy of discrimination' exception"); Webb v. Merck & Co., 206 F.R.D. 399, 407 (E.D. Pa. 2002) ("Since defendant's decision-

making processes with regard to promotion and compensation are at least in part objective...plaintiffs cannot establish that defendants utilized a decision-making process which was entirely [**14] subjective for purposes of satisfying Rule 23(a)'s commonality and typicality requirements"); Lott v. Westinghouse Savannah River Co., 200 F.R.D. 539, 560 (D.S.C. 2000) (rejecting plaintiffs' claim of commonality in part because "a host of relevant objective factors guide the decision-maker's decision").

The regulations governing the decisions of county committees set forth eleven eligibility criteria, at least eight of which (the first, second, sixth, seventh, eighth, ninth, tenth and eleventh) cannot be properly characterized as subjective. They are: 1) United States citizenship; 2) the legal capacity to incur loan obligations; 3) education and/or farming experience in managing or operating a farm or ranch; 4) character (emphasizing credit history, past record of debt repayment and reliability); 5) a commitment to carrying out undertakings and obligations; 6) inability to obtain credit elsewhere; 7) farm size (the farm to be no larger than a family farm); 8) and 9) loan history (restricting the permissible number of prior years in which the applicant executed a promissory note for a "direct OL loan"); 10) no previous debt forgiveness causing a loss to the Agency; [**15] and 11) no delinquency on any federal debt. See 7 C.F.R. § 1941.12(a)(operating loans) 4; see [*21] also 7 C.F.R. § 1943.12(a)(farm ownership loans) 5.

4 The objectivity of these criteria is one of the factual distinctions between this case and

the recently-decided case *McReynolds v. Sodexho Marriott Servs., Inc.*, 208 F.R.D. 428 (D.D.C. 2002). The Court in McReynolds certified a nationwide class of African American employees who had made disparate impact and treatment claims in regard to Sodexho's employment practices, including a decentralized, subjective pro-motion process. *See McReynolds*, 208 F.R.D. at 440-41. In that case, however, the Court based its holding on the fact that the decision-making process in that case was entirely subjective, pursuant to the stated Falcon exception: "Falcon's footnote 15...carved out an exception...for 'entirely subjective decisionmaking processes'...what is significant [here] is that the determination of which criteria to use is left entirely to the individual manager." Id. at 442 (emphasis in original) (citation omitted). The presence of at least some mandatory objective criteria in the decision-making process take this case out of the purview of the Falcon exception, and distinguish this case from McReynolds.

[**16]

5 Citations are to the current provisions of the Code of Federal Regulations. The parties have not indicated that these provisions have materially changed over the relevant time period.

The issue presented by this case was considered five years ago by Judge Thomas A. Flannery in Williams v. Glickman, 1997 U.S. Dist. LEXIS 1683,

Civ. No. 95-1149, 1997 WL 198110 (D.D.C. Apr. 15, 1997) (Williams II). In Williams II, Judge Flannery denied a motion for reconsideration of his previous denial of class certification to a group of African American and Hispanic farmers claiming discrimination arising out of the USDA loan application process. The Williams plaintiffs had based their suggestion of commonality on the allegation that county supervisors were subjectively applying the loan standards in a discriminatory fashion. Williams II at *2. After reviewing the same criteria involved in this case, Judge Flannery held that plaintiffs had not satisfied the commonality requirement:

> [Plaintiffs' assertion does] not constitute significant proof of an entirely subjective decision-making process[], [**17] as required by Falcon. The plaintiffs appear to be arguing that local officials are ignoring applicable standards, not that such officials operate in a system without standards which allows them to make decisions subjectively. The plaintiffs, then, are not really describing "common practices" under Falcon.

Id. (emphasis in original) (footnote omitted).

Plaintiffs assert that this case is not like Williams II, because here they are indeed alleging that the system permits unfettered, highly subjective decision-making, and they assert that their statistics will demonstrate the discriminatory results of that system. Plaintiffs' expert, Dr. Jerry A. Hausman, offers the opinion that Hispanic farmers are less

likely to receive loans than whites. *See* Hausman Declaration at P 15. What Dr. Hausman's analysis does not show, or purport to show, however, is that this fact is attributable to any one, or more, of the arguably subjective criteria that are part of the loan approval process. A statistical analysis demonstrating that Hispanic farmers are disproportionately disqualified on grounds of "character" or "commitment," 7 C.F.R. § 1941.12(a) [**18] , might well support a finding of commonality as to those criteria, which are indeed subjective. Dr. Hausman's analysis, however, fails to tie the statistical disparity he observes to any one or more subjective criterion and thus fails to establish that subjective decision-making is common to the proposed class. *See Webb*, 206 F.R.D. at 408 n.2 (finding plaintiffs' proffered statistics neither instructive nor determinative when they did not account for non-discriminatory variables) 6. Here, as in Hartman, "plaintiffs' statistics may have demonstrated that discrimination against ... applicants ... was afoot, [but] nothing in the record so far permits the additional inference that class members [*22] suffered a *common injury*." 19 F.3d at 1472 (emphasis in original) 7.

6 Plaintiffs blame their inability to present better statistical proof on defendant's databases, which do not contain specific reasons for the denials of loan and benefit applications made by Hispanic farmers. Plaintiffs cite cases such as De Medina v. Reinhardt, 222 U.S. App. D.C. 371, 686 F.2d 997 (D.C. Cir. 1982), and Segar v. Smith, 238 U.S. App. D.C. 103, 738 F.2d 1249

(D.C. Cir. 1984), for the basic proposition that they should be permitted to proceed with a "reduced level of proof [as] relevant qualification data are unavailable...." *De Medina*, 686 F.2d at 1009, n.7. De Medina and Segar, however, both dealt with attempts to make out prima facie cases of discrimination. Plaintiffs do not explain how such cases apply to a motion for class certification. Perhaps they are suggesting that, in the absence of better USDA data, their "across the board" showing ought to shift the burden of disproving commonality to defendant, requiring defendant to show that Hispanic farmers' applications were rejected for objective reasons, just as proof of a prima facie case shifts the burden of proof in a Title VII case. If that is the suggestion, it is unsupported by case authority and unpersuasive.

More troubling are plaintiffs' assertions that defendant has engaged in the destruction of relevant documents in violation of document retention regulations. This assertion is the stated reason for plaintiffs' very recent motion for an order requiring that defendant preserve all documents "conceivably relevant" to the litigation. Plaintiffs urge that wrongful destruction would warrant an adverse inference against defendant. It is not clear whether such an inference could be used to support a Rule 23(a) commonality finding -- no precedent to that effect has been cited by plain-tiffs, and we have found none -- but the assertion of

document destruction is unproven, and the question is thus premature.

[**19]

7 Plaintiffs' statistical problem is endemic to the entire class certification motion, but is particularly toxic to their claim of disparate impact "Especially in [disparate impact] cases where an employer combines subjective criteria with the use of more rigid standardized rules or tests, the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities." *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656, 104 L. Ed. 2d 733, 109 S. Ct. 2115 (1989) (emphasis added) (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994, 101 L. Ed. 2d 827, 108 S. Ct. 2777 (1988) (O'Connor, J., concurring)); *see Lu v. Woods*, 717 F. Supp. 886, 890 (D.D.C. 1989).

Commonality is defeated -- not only by plaintiffs' inability to correlate the discrimination they allege with subjective loan qualification criteria -- but also by the large numbers and geographic dispersion of the decision-makers. *See Stastny v. S. Bell Tel. & Tel. Co.*, 628 F.2d 267, 279 (4th Cir. 1980) ("substantial degree of [**20] and perhaps almost complete local autonomy in separate facilities...cuts against any inference for class action commonality purposes that local facility practices were imposed or enforced state-wide with respect to a state-wide class"); Webb, 206 F.R.D. at 406 (commonality and

typicality lacking when plaintiffs' claim based on "individual decisions made by hundreds if not thousands of individual managers at all of these organizations"); *Car-son v. Giant Food, Inc.*, 187 F. Supp. 2d 462, 471 (D. Md. 2002) ("Putative class members worked in at least thirteen different facilities, located at five different towns or cities. This geographical diversity itself would make class treatment inappropriate"); *Zachery v. Texaco Exploration and Prod., Inc.*, 185 F.R.D. 230, 239 (W.D. Tex. 1999) ("In this case, the proposed class is spread across fifteen states in seventeen separate business units, each of which, until 1998, had varying degrees of autonomy over evaluation and promotion decisions...delving into the practices of each local business unit and conceivably even into the individual decisions is precisely the type of individualized inquiry that [**21] class actions were designed to avoid").

The thousands of Hispanic farmers plaintiffs seek to represent have dealt with hundreds, if not thousands, of local FSA officials, in more that 2,700 county offices across the country, over a 19-year period. *See* Plaintiffs' Reply to Defendant's Opposition at 12. Those farmers' allegations of discrimination cannot be sorted out with-out individualized inquiries regarding the practices of the various county committees 8. Plaintiffs' statistical analysis does not inform this issue, because it is not broken down by county, or even by state. Commonality has been found in a nationwide class with decentralized decision-making when "plaintiffs' statistical expert concluded that this

pattern of discrimination was company-wide and did not vary significantly by division," *see McReynolds*, 208 F.R.D. at 441 (emphasis added), but here, plaintiffs have proffered only a national average of loan ratios. *See Stastny*, 628 F.2d at 279 (rejecting statistical evidence that showed only overall disparities instead of disparities by individual facility).

> 8 The geographic dispersion of the decision-makers is especially damaging to the assertion of commonality with regard to plaintiffs' disparate treatment claim. A successful disparate treatment plaintiff must establish discriminatory intent on the part of the decisionmaker. That proof would have to be adduced on at least a county-by-county basis. See, e.g., Brooks v. Circuit City Stores, Inc., 1996 U.S. Dist. LEXIS 9869, Civ.A. No. DKC 95-3296, 1996 WL 406684 at *4-5 (D. Md. June 17, 1996); cf. Cook v. Boorstin, 246 U.S. App. D.C. 201, 763 F.2d 1462, 1472 (D.C. Cir. 1985) (dictum) (Court suggested that disparate treatment plaintiffs may have met typicality requirement through use of affidavits and memoranda showing Library of Congress, as sole source of decision-making authority, engaged in discrimination through its subjective standards).

[**22] Rule 23(b) Analysis

Under Rule 23(b), the question is whether the pro-posed class could be certified under Rule 23(b)(2),

Rule 23(b)(3), or a hybrid of the two. The inquiry focuses on the relief plaintiffs seek.

Rule 23(b)(2)

Rule 23(b)(2) is properly applied to cases that seek injunctive or declaratory relief and "does not extend to cases in which the appropriate final relief relates exclusively or predominately to money damages." Fed.R.Civ.P. 23 Advisory Committee's Note [*23] (1966). Courts have permitted (b)(2) classes to recover monetary relief in addition to declaratory or injunctive relief where the monetary relief does not predominate, *see Eubanks v. Billington*, 324 U.S. App. D.C. 41, 110 F.3d 87, 92 (D.C. Cir. 1997), but when, exactly, a claim for monetary relief comes to predominate over a claim for declaratory or injunctive relief has not been decided in this Circuit, nor is the caselaw uniform in other Circuits. In the Fifth, Eleventh and Seventh Circuits "monetary relief predominates in (b)(2) class actions unless it is incidental to requested injunctive or declaratory relief. By incidental, we mean damages that flow directly from liability to the class as a whole [**23] on the claims forming the basis of the injunctive or declaratory relief." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998) (internal citations omitted) (emphasis in original); *Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir. 2001); *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 898 (7th Cir. 1999). The Second Circuit's approach is more flexible and ad hoc. *See Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 164 (2d Cir. 2001) (rejecting Allison "incidental" approach in

favor of ad hoc balancing of the relative importance of the remedies sought).

One might expect the District of Columbia Circuit to find the Second Circuit's ad hoc balancing more persuasive than the Fifth Circuit's bright-line rule, *see Taylor v. D.C. Water & Sewer Auth.*, 205 F.R.D. 43, 50 (D.D.C. 2002), but the outcome of that debate would not affect the instant case, because in this case the monetary relief plaintiffs seek predominates under any applicable test. Plaintiffs' Second Amended Complaint seeks damages of $ 20 billion, or $ 1 million per class member in an estimated class of 20,000 people. [**24] The only declaratory relief it seeks is an order declaring that plaintiffs and the Class members were denied equal credit and other farm program benefits and that plaintiffs have a right to full and timely enforcement of their civil rights discrimination complaints. 2d Amended Complaint at P 120. It seeks no injunctive relief at all 9. Judge Flannery came to the same conclusion in *Williams v. Glickman* (Williams I), 1997 U.S. Dist. LEXIS 1683, Civ. No 95-1149, Memorandum Opinion (D.D.C. February 14, 1997), a suit very much like this one that he found to be "essentially a suit to recover damages, not to obtain injunctive relief." Williams I, Memorandum Opinion at 19.

9 If plaintiffs' complaint-processing claim were still in the case, their prayer for "specific performance with respect to their program benefits" (under a claim of violation of the Administrative Procedure Act), 2d Amended Complaint P 129, might support the provisional

> certification of a Rule 23(b)(2) class. The fate of such a certification is at least uncertain after *In re Veneman*, 309 F.3d 789, [WL] at *1, however, and it is also worth noting that the class ultimately certified in Pigford for purposes of the settlement consent decree was a Rule 23(b)(3) class. *See Pigford v. Glickman*, 185 F.R.D. 82, 94 (D.D.C. 1999) ("The parties in this case agreed that it was more appropriate -- and fairer to the members of the class -- to ask the Court to certify the class under Rule 23(b)(3) for all purposes, particularly since the proposed settlement involves primarily monetary relief"), *aff'd* 340 U.S. App. D.C. 420, 206 F.3d 1212 (D.C. Cir. 2000).

[**25] *Rule 23(b)(3)*

Rule 23(b)(3)'s predominance criterion is far more demanding than the commonality requirement of Rule 23(a). *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-24, 138 L. Ed. 2d 689, 117 S. Ct. 2231 (1997). Numerous cases have held that decentralized, locally autonomous subjective decision-making practices pre-sent predominately *individual, not common*, issues in discrimination cases. *In Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999 (11th Cir. 1997), for example, a proposed nationwide class of Motel 6 employees could not sustain a class action suit alleging racial discrimination because the widely-dispersed class did not satisfy Rule 23(b)'s predominance requirement:

> The Jackson plaintiffs' claims will re-quire distinctly case-specific inquiries into the facts surrounding each alleged incident of discrimination.... Furthermore, even factual issues that are common to many of the Jackson plaintiffs...will re-quire highly case-specific determinations at trial. These issues are clearly predominant over the only issue arguably common to the class -- whether Motel 6 has a practice or policy of racial discrimination.

[*24] *Jackson*, 130 F.3d at 1006. [**26] Similar results, on similar reasoning, were reached in Carson, 187 F. Supp. 2d at 471-72 (highly individual nature of discrimination claims concerning subjective decision-making at various facilities precluded fulfillment of pre-dominance requirement); *Reid v. Lockheed Martin Aeronautics Co.*, 205 F.R.D. 655, 684 (N.D. Ga. 2001) (discrimination suit challenging subjective practices in several facilities could not meet predominance requirement because court would focus on individual circum-stance of each member of plaintiff class); *Ramirez v. DeCoster*, 194 F.R.D. 348, 353 (D. Me. 2000) ("Because each worker's exposure to this subjective decision-making...will vary in nature and degree, any trial on 'class' issues will quickly erode into a series of individual trials focused on issues specific to each worker"); *Riley v. Compucom Sys., Inc.*, 2000 U.S. Dist. LEXIS 4096, No. 398 CV1876L, 2000 WL 343189 at * 6 (N.D. Tex. March 31, 2000) (discrimination claims of geographically dispersed class regarding subjective decision-making process did not pass predominance requirement because they

"failed to appreciate the overwhelming number of individual-specific [**27] issues") (internal quotation omitted); *Brooks v. Circuit City Stores*, 1996 U.S. Dist. LEXIS 9869, No. 95-3296, [WL] at *6 (D. Md. June 17, 1996) (common questions did not predominate when discrimination claims centered on subjective decision-making of management at different store locations); *Celestine v. Citgo Petroleum Corp.*, 165 F.R.D. 463, 470 (W.D. La. 1995) (although attack on defendant's subjective decision-making policies survived 23(a) commonality test, case presented need for individualized evidence regarding each plaintiff's discrimination allegations, so individual questions predominated).

The instant case, if allowed to proceed as a class action, would quickly devolve into hundreds or perhaps thousands of individual inquiries about each claimant's particular circumstances. No individual plaintiff could prevail without scrutiny of his or her individual loan application to determine whether the application was "feasible" in terms of such objective criteria as an applicant's financial qualifications and repayment ability. Williams I, Memorandum Opinion at 20. Even if the presence of classwide discrimination were established, individual issues would be [**28] much more important to any claimant's recovery.

Another Rule 23(b)(3) criterion, that a class action is superior to other methods of adjudication, does favor the plaintiffs, if it is permissible as part of the class certification process to consider (a) the increased likelihood of settlement after class certification, and (b) the accelerated pace of

individual determinations that can be expected in a class settlement. The Pigford case, frustrating as it has been to the parties in some respects, has successfully resolved thousands of individual cases with streamlined awards of $ 50,000 or with Teamster-type hearings. *See Pigford v. Veneman*, 292 F.3d 918, 920 (D.C. Cir. 2002); *Pigford v. Veneman: Consent Decree in Class Action Suit by African American Farmers, Background and Current Status*, at http: //www.usda.gov/da/consentsum.htm. It seems unlikely that USDA would have proceeded nearly as quickly on individual Black farmer cases were it not for the class action settlement. A class action may indeed be superior to other methods of adjudicating the claims of Hispanic farmers. Without predominant of common questions of law or fact, however, that superiority [**29] is not enough to sustain class certification.

Hybrid Certification

Plaintiffs urge consideration of a hybrid class like that authorized by Eubanks, supra. Such a class would be certified under Rule 23(b)(2) for purposes of injunctive and declaratory relief, and under Rule 23(b)(3) for monetary damages. See Supplemental Memorandum at 39-40. There are a two impediments to this request. First, it is out of the question that this class could be certified under Rule 23(b)(3), because of the predominance issues discussed above, so the proposed class would not really be a hybrid, but rather a Rule 23(b)(2) class with a different name. *See Jefferson*, 195 F.3d at 899 (hybrid class certification appropriate only "assuming that certification under Rule 23(b)(3)

otherwise is sound") (dictum); *Cooper v. Southern Co.*, 205 F.R.D. 596, 631 (N.D. Ga. 2001) (hybrid certification unavailable [*25] when "common elements of proof would not predominate in any event so as to meet the requirements of (b)(3)"); *Lott*, 200 F.R.D. at 563 (hybrid certification inappropriate because 23(b)(3) could not be satisfied, and hybrid certification "requires [**30] satisfaction of both the (b)(2) and (b)(3) requirements").

Second, it is not at all certain that this class could be certified under Rule 23(b)(2), even temporarily. *See In re Veneman*, 309 F.3d 789, [WL] at *1. Rule 23(b)(2) demands a showing that a defendant has acted or refused to acts in ways generally applicable to the entire class. Here, the decentralization of loan and other benefits decision could negate such a finding of general applicability. *See Webb*, 206 F.R.D. at 409 ("Here, there are just too many individual issues which prevent this action from being certified under Rule 23(b)(2). The fact finder would have to review literally thousands of individual decisions made by hundreds of individual managers...at six different facilities"); Riley, 2000 U.S. Dist. LEXIS 4096, [WL] at *3.

An appropriate order accompanies this memorandum.

JAMES ROBERTSON

United States District Judge

ORDER

For the reasons set forth in the accompanying memorandum, plaintiffs' motion for class certification [18] is **denied**.

A status conference is set for December 18, 2002, at 10 A.M. SO ORDERED this 2nd day of December 2002.

JAMES ROBERTSON

[**31] United States District Judge

GUADALUPE L. GARCIA, et al., Plaintiffs, v. ANN V. VENEMAN, Secretary, United States Department of Agriculture, Defendant.

Civil Action No. 00-2445 (JR)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

224 F.R.D. 8; 2004 U.S. Dist. LEXIS 18400

September 10, 2004, Decided

SUBSEQUENT HISTORY: Motion denied by *Garcia v. Johanns*, 2005 U.S. App. LEXIS 12468 (D.C. Cir., June 23, 2005)

Affirmed in part and remanded in part by *Garcia v. Johanns*, 2006 U.S. App. LEXIS 7892 (D.C. Cir., Mar. 31, 2006)

PRIOR HISTORY: *Garcia v. Veneman*, 211 F.R.D. 15, 2002 U.S. Dist. LEXIS 24113 (D.D.C., 2002)

Love v. Veneman, 2001 U.S. Dist. LEXIS 25201 (D.D.C., Dec. 13, 2001)

DISPOSITION: Plaintiffs' motion for class certification denied. Plaintiffs' motion for leave to file third amended class action complaint denied without prejudice. Defendant's motion to strike denied. Pproceedings stayed pending further order of Court.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff Hispanic farmers filed a lawsuit against defendant Secretary of the United States Department of Agriculture (USDA) for alleged discrimination based on the denial of USDA credit and non-credit benefits over a period of 20 years. The Hispanic farmers filed a motion for class certification.

OVERVIEW: The Hispanic farmers alleged that they suffered disproportionately high loan rejection rates and received disproportionately low disaster benefit payments from the USDA. The class that they sought to represent included Hispanic farmers who allegedly suffered discrimination at the hands of county agents or county committees in the county offices nationwide that numbered Hispanic farmers among their clientele. They also contended that a denial of class certification would be uninformed by the information that they might be able to develop through a broad discovery program of the broad pattern of discrimination that they believed existed over the 20 years of USDA administration of farmers' loan and disaster relief programs. The court found that class certification was improper because the Hispanic farmers, through their anecdotal evidence, failed to establish the commonality requirement for class certification established by Fed R. Civ. P. 23. Additionally, what the Hispanic farmers assembled and presented did not give rise to probable cause to believe that a searching and expensive discovery program would unearth sufficient evidence of commonality to support class certification.

OUTCOME: The Hispanic farmers' motion for class certification was denied, the Hispanic farmers' motion for leave to file a third amended class action complaint was denied without prejudice, and the court issued a sua sponte order staying proceedings in the court so that the Hispanic farmers could seek appellate review of the class certification question.

CORE TERMS: farmer, commonality, class certification, discovery, subjective, farm, class action, disparate, disaster, subclasses, loan applications, bank accounts, citizenship, supervised, delaying, borrower, farm credit, injunctive relief, reasonable rates, legal capacity, family farm, decision-making, certification, inappropriate, subjectivity, statistical, specificity, eligibility, anecdotal, servicing

COUNSEL: [**1] For GUADALUPE L. GARCIA, For himself and on behalf of G.A. GARCIA and SONS FARM, TONY JIMINEZ, PATRICIA JIMINEZ, MR. X, MRS. X, Plaintiffs: Alexander John Pires, Jr., CONLON, FRANTZ, PHELAN & PIRES, Washington, DC.

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For GLORIA MORALEZ, BEATRICE GARZA, RODOLFO GARZA, LARRY CHAVARRIA, ROBERT CHAVARRIA, for themselves and on behalf of Chavarria Farming Co., YSIDORO F. MENDOZA, ALBERTO A. ACOSTA, JIMMY ALVAREZ, ELIZABETH ALVAREZ, DAVID FLORES, Mr., PATRICK R. FLORES, Mr., GILBERT A. GARCIA, Mr., F. [**2] RICHARD LLANEZ, Mr., EDWARDO R. LOPEZ, Mr., ISMAEL O. MEDINA, Mr., SONJA MEYERS, Ms., ROBERT ORTEGA, JR., Mr., EDWARD W. PROVENCIO, Mr., GEORGE L. PROVENCIO, Mr., ALEX CONTRERAS, Mr., JOE CONTRERAS, Mr., LOUIS CONTRERAS, Mr., HECTOR T. FLORES, Mr., JUAN J. FLORES, Mr. R, ALBERTO M. ORTEGA, Mr., RENE ORTEGA, Ms., RUPERTO R. RODRIGUEZ, Mr., ERASMO VALDEZ, Mr., DIONICIO VALDEZZ, II, Mr., ARTURO VASQUEZ, Mr., RODOLFO VASQUEZ, Mr., DAVID L. HINJOSA, SR., Mr., Plaintiffs: Phillip L. Fraas, HOGAN & HARTSON, Washington, DC.

JUDGES: JAMES ROBERTSON, United States District Judge.

OPINION BY: JAMES ROBERTSON

OPINION

[*9] *MEMORANDUM ORDER DENYING CLASS CERTIFICATION*

This case presents claims of discrimination by Hispanic farmers nationwide who in various ways were denied USDA credit and non-credit benefits over a period of some twenty years. Before the Court for the second time is the question of whether the case may be certified as a class action. When the question was first presented, by a motion for class certification filed in April 2002, the answer was in the negative, because plaintiffs had not shown, nor did it appear from the record that they could show, a common question of law or fact within [**3] the meaning of Fed. R. Civ. P. 23(a). *Garcia v. Veneman*, 211 F.R.D. 15 (D.D.C. 2002)("*Garcia I*"). Plaintiffs noticed an appeal from that order but withdrew the appeal when they were given leave to conduct limited discovery and invited to supplement their motion, Tr. of Jan. 15, 2003 Status Hr'g, at 2. Plaintiffs have now conducted further discovery - although the discovery has by no means been as broad and searching as they wished - and they have presented a supplemental brief on the issue of commonality, which I have treated as a renewed motion for class certification. Because I have concluded that plaintiffs' showing is still insufficient to establish the prerequisites for class certification established by Rules 23(a)(2), 23(b)(2), and 23(b)(3), and that further discovery is unlikely to change the picture, I am today issuing a second order denying class certification. This ruling, taken together with my earlier ruling that plaintiffs' claim of failure to

investigate did not state a claim under the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691 *et. seq.* (ECOA), or the Administrative Procedure [**4] Act, 5 U.S.C. §§ 701 *et. seq.*, *see* Mem. Order of Mar. 20, 2002, so fundamentally alters the posture of this case that plaintiffs will presumably seek an interlocutory appeal. [1] I will accordingly issue a *sua sponte* order staying proceedings in this Court so that plaintiffs may seek appellate review of the class certification question. *See* Fed. R. Civ. P. 23(f). If asked to do so, I will also certify my Memorandum Order of March 20, 2002 pursuant to 28 U.S.C. § 1292(b).

1 It is not for me to say whether this ruling is "questionable," but it may present a "death-knell situation" for plaintiffs. *See In re Lorazepam & Clorazepate Antitrust Litig.*, 351 U.S. App. D.C. 223, 289 F.3d 98, 102, 105 (D.C. Cir. 2002). In any event, this certification decision presents an "unsettled and fundamental issue of law relating to class actions, important both to [this] specific litigation and generally, that is likely to evade end-of-the-case review." *Id.* at 105.

[**5] ***Analysis***

This Memorandum Order is intended to pick up where *Garcia I* left off, and it should be read in conjunction with that ruling.

1. Proceedings since *Garcia I*

In *Garcia I*, I acknowledged the possibility that statistical analysis demonstrating that Hispanic

farmers were disproportionately denied credit or non-credit benefits on subjective grounds, such as "character" or "commitment," might support a finding of commonality. At a status conference held on December 18, 2002, shortly after the issuance of *Garcia I*, I noted that certification would require more than anecdotal evidence (the plural of "anecdotes" is not "data"). I said I thought there must be a way to test plaintiffs' hypothesis without inspecting the files of 2700 local offices, and I encouraged plaintiffs to develop a modest discovery plan designed to link USDA's data to what plaintiffs claimed were subjective USDA criteria. [*10] At a subsequent status conference, on January 15, 2003, plaintiffs asserted their need for up to 25 depositions and 50 interrogatories, stating that these would involve individuals in the six states where most of the named plaintiffs reside (Texas, California, [**6] New Mexico, Florida, Washington, and Colorado). Plaintiffs also wanted to take Rule 30(b)(6) depositions of USDA persons who designed the databases that USDA has said contain all the data that has been captured on its benefit programs, but that plaintiffs already considered nearly useless for their purposes. At that time, I noted that I was trying to find a balance between plaintiffs' legitimate need to take discovery, if they had a colorable commonality claim, and the government's legitimate assertion of burdensomeness. I directed plaintiffs to serve their discovery so that I could evaluate any government objections.

At a status conference held on April 29, 2003, I noted again that there had to be a way to develop a

discovery plan that would produce a good random sample. On July 15, 2003, government counsel asserted an inability to fashion such a sample and pointed to the databases that the government had already produced. Plaintiffs' counsel complained that the databases were completely unhelpful because they did not indicate why a particular application had been denied. Tr. of Jan. 15, 2003 Status Hr'g, at 5-6. The government finally produced the loan and disaster benefit files [**7] of some 37 of the approximately 110 named plaintiffs. I instructed plaintiffs' counsel to examine those files and to advise me whether "there is in those materials a colorable basis on which plaintiffs can assert that . . . a substantial number of [the named plaintiffs] were rejected for loans or benefits on grounds that are the kinds of subjective grounds that plaintiffs assert[] [they] can establish commonality for." *Id.* at 22. I suggested that, upon such a showing, I might permit further discovery of other files to provide a basis for a more rigorous statistical comparison. I did not lay down a bright line definition of what I thought would be substantial, but I suggested that 25 out of 37 might be satisfactory while 5 out of 37 would probably not be. *Id.* at 22-23.

2. Plaintiffs' submission

In their supplemental brief on the issue of commonality filed on December 5, 2003, plaintiffs reviewed the results of the discovery they had taken. They submitted that they had demonstrated commonality with respect to both disparate impact and disparate treatment claims, and they urged that,

should I find otherwise, they be permitted further, broad-ranging discovery.

[**8] Plaintiffs' disparate impact theory is that the overall operation of USDA's farm credit and non-credit benefit programs is "one practice" (or that it must be so considered because USDA's failure to collect and maintain data makes it impossible to analyze the effect of separate components); that this "one practice" has had an adverse impact upon Hispanic farmers, as shown by discovery to date; and that class certification is appropriate because this "one practice" is subjective enough to come within any but the most rigid construction of the Supreme Court's dicta in *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 159 n. 15, 72 L. Ed. 2d 740, 102 S. Ct. 2364 (1982). Plaintiffs' disparate treatment theory asserts that USDA is itself the "single actor" responsible for a pattern and practice of discrimination against Hispanic farmers (because USDA has acquiesced in or ratified notoriously subjective and discriminatory practices of local offices and county commissioners), and that the sampling of evidence plaintiffs have been able to gather from the files they have examined reveals five sub-patterns of discrimination, any one of which would also support a finding sufficient [**9] to satisfy the commonality requirement of Rule 23(a)(2): (I) refusal to provide Hispanic farmers with loan applications or assistance in completing applications; (ii) subjecting Hispanic farmers to protracted delays in processing and funding their loans; (iii) using subjective criteria to reject the applications of Hispanic farmers; (iv) unnecessarily

subjecting Hispanic farmers to the inconvenience of supervised bank accounts; and (v) delaying or denying loan servicing for Hispanic farmers.

At the same time that they submitted their supplemental brief, plaintiffs moved for leave [*11] to file a third amended complaint, setting forth five subclasses of Hispanic farmers, drawn to fit the sub-patterns plaintiffs claim to have discovered. Pls.' Proposed Third Am. Class Action Compl., P 103. [2]

> 2 The amended complaint would also add and emphasize prayers for equitable relief, since *Garcia I* rejected Rule 23(b)(2) certification on the ground, *inter alia*, that the original complaint had sought only limited declaratory relief and "no injunctive relief at all." 211 F.R.D. at 23.

[**10] **3. Disparate impact theory**

The plaintiff in a disparate impact case must "isolate and identify the specific employment practices that are allegedly responsible for any observed statistical disparities," *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 994, 101 L. Ed. 2d 827, 108 S. Ct. 2777 (1988). Plaintiffs have sought to finesse that requirement by asserting that isolation and identification are impossible because USDA did not keep adequate records. I rejected a variant of that argument in *Garcia I* as "unsupported by case authority and unpersuasive," 211 F.R.D. at 21 n. 6, but now plaintiffs have invoked the 1991 amendments to Title VII, 42 U.S.C. § 2000e-2(k)(1)(B)(I) - Congress's response to the burden of

proof holding in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 104 L. Ed. 2d 733, 109 S. Ct. 2115 (1989) - to assert (by analogy to employment law) that USDA's entire decision-making process must be considered "one . . . practice" because its separate components cannot be analyzed. Pls.' Mem. in Resp. to Ct.'s July 15, 2003 Order With Respect to Commonality, at 8 ("Pls.' Mem."). It is a creative argument, but ultimately [**11] an unpersuasive one. Not only does it "leapfrog to the merits," contrary to the teaching of *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974), as the Government observes, Def.'s Opp'n to Class Certification & Resp. to Pls.' Dec. 5, 2003 Mem. Regarding Commonality, at 4, but it also boils down to the proposition that unexplained discrepancies in the distribution of government benefits satisfy the commonality requirement of Rule 23(a)(2) without more. That proposition is untenable. Anecdotal proof of discrimination against Hispanic farmers, and even statistical proof that Hispanic farmers have received proportionally less assistance than others, will not be enough to support class certification. *Falcon* reminds us that the underlying purpose of the Rule 23(a)(2) commonality requirement is to permit the court to define the class and determine whether the representation is adequate, to let the defendant know how to defend, and "' most significantly'" to guard against the "potential unfairness to the class members bound by the judgment if the framing of the class is overbroad." 457 U.S. at 161, (quoting *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969)). [**12] That is why "'precise pleadings'"

with "'reasonable specificity'" are required. *Id.* at 160-01. The plaintiffs in this case have not identified a USDA credit or disaster benefit practice established at the national level that comes close in specificity to the example of a common question offered by the Supreme Court in *Falcon* ("a biased testing procedure to evaluate both applicants for employment and incumbent employees," 457 U.S. at 159 n. 15). Without such specificity, *Falcon* teaches against class certification, except possibly in the "conceivable" case where there is *both* "significant proof" that the defendant "operated under a general policy of discrimination" *and* "the discrimination manifested itself . . . in the same general fashion, such as through entirely subjective decisionmaking processes." *Id.* As discussed in later sections of this memorandum, plaintiffs have neither shown that they can satisfy that test nor established probable cause to believe that they could do so, if only they could take more discovery.

4. Disparate treatment theory

Plaintiffs assert (again "leapfrogging to the merits") that USDA was on notice of discrimination [**13] against Hispanic farmers and that the Secretary "acquiesced in and ratified" that discrimination by failing to take meaningful corrective measures. That construction of the alleged facts appears to be an effort to sidestep my conclusion in *Garcia I* that "commonality is defeated . . . by the large numbers and geographic dispersion of the decision-makers," 211 F.R.D. at 22, so that, having identified a "single actor," plaintiffs may go on to assert USDA's liability for [*12] a pattern and

practice of discouraging Hispanic farmers from availing themselves of farm credit and noncredit programs. Pls.' Mem., at 30-32. (Plaintiffs then go on to identify five sub-patterns and practices by which USDA allegedly "discouraged" Hispanic farmers: denying applications and assistance, delaying processing, using "highly subjective criteria," subjecting them to supervised bank accounts, and delaying or denying loan servicing. These alleged practices have become the labels for the five subclasses plaintiffs now seek to represent.)

I will step over the threshold question of whether a private pattern and practice cause of action can ever be maintained under ECOA. [3] Neither side has briefed [**14] the issue, and I will assume for the sake of argument that plaintiffs' pattern and practice claims are cognizable. On the other side of the threshold, however, lies a question that cannot be assumed away, namely, whether plaintiff's sweeping allegations of departmental acquiescence and ratification will support class certification in view of *Falcon's* concern about "across-the-board" discrimination claims and its insistence upon specificity in pleading. That question must again be answered in the negative. First, plaintiffs' reliance upon *EEOC v. Inland Marine Industries*, 729 F.2d 1229 (9th Cir. 1984), *Baer v. First Options of Chicago, Inc.*, No. 90 C 7207, 1993 U.S. Dist. LEXIS 19489 (N.D. Ill. Dec. 3, 1993), and other similar cases is misplaced. Those cases do stand for the proposition that a pattern of notice and refusal to correct can serve as proof of the intent element in an employment discrimination case, but

they do not address the implication of such a pattern upon class certification. The holdings of those cases would not support a conclusion that USDA's alleged acquiescence and ratification would be enough by itself to satisfy the [**15] commonality requirement. Proof of conscious inaction on the part of USDA (*i.e.*, acquiescence and ratification) in the face of numbers demonstrating that Hispanic farmers suffered disproportionately high loan rejection rates and received disproportionately low disaster benefit payments might satisfy the first *Falcon* requirement of a "general policy of discrimination," but it would be no help at all with respect to the second *Falcon* requirement of decision-making processes that were "entirely subjective." The common discriminatory practice that *Falcon* and its progeny requires is still missing.

3 Pattern or practice *employment* cases were originally legislatively created, first as cases that could be brought only by the Attorney General, and then as cases that could be brought by the EEOC. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 328 n. 1, 336 n. 16, 52 L. Ed. 2d 396, 97 S. Ct. 1843 (1977). Although the history is somewhat murky, private class action pattern or practice litigation appears to be a judge-made construct that arose from developments in class action litigation and the "private attorney general" concept. *See, e.g., Cooper v. Fed. Reserve Bank*, 467 U.S. 867, 876 n. 9, 81 L. Ed. 2d 718, 104 S. Ct. 2794 (1984); *Int'l Bhd. of Teamsters*, 431 U.S. at 358-60 (1977); *Lowery v. Circuit City*

Stores, Inc., 158 F.3d 742, 760 (4th Cir. 1998), *vacated on other grounds by* 527 U.S. 1031, 144 L. Ed. 2d 790, 119 S. Ct. 2388 (1999). *See generally* Robert Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 Vand. L. Rev. 905, 919, 934 (1978). There is no language in the ECOA statute supporting private pattern or practice cases. The statute contains pattern or practice language, *see* 15 U.S.C. § 1691e(h) ("Whenever he has reason to believe that one or more creditors are engaged in a pattern or practice in violation of this subchapter, the Attorney General may bring a civil action. . . ."), but on its face appears to contemplate only the government as plaintiff. ECOA law has nevertheless been held generally to track Title VII. *See, e.g.*, *Haynie v. Veneman*, 272 F. Supp. 2d 10, 16 (D.D.C. 2003) (analogizing ECOA to Title VII); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215 (1st Cir. 2000) ("In interpreting the ECOA, this court looks to Title VII case law. . . ." *But see Latimore v. Citibank Fed. Sav. Bank*, 151 F.3d 712, 713-15 (7th Cir. 1998) (rejecting the Title VII burden-shifting model for ECOA). That may be the reason why a number of courts have simply assumed without discussion or analysis that ECOA's pattern or practice language supports a private cause of action. *See, e.g.*, *Hargraves v. Capital City Mortg. Corp.*, 140 F. Supp. 2d 7, 14 (D.D.C. 2000); *Sallion v. SunTrust Bank, Atlanta*, 87 F. Supp. 2d 1323, 1327 (N.D. Ga. 2000); *Rodriguez v. Ford Motor Credit Co.*, 2002 U.S. Dist.

LEXIS 7280, No. 01 C 8526, 2002 WL 655679, at *5 (N.D. Ill. Apr. 19, 2002), *Massey v. First Greensboro Home Equity, Inc.*, 1998 U.S. Dist. LEXIS 6575, No. 97-1292-CIV-T-17, 1998 WL 231141, at *9 (M.D. Fla. Apr. 27, 1998). No court has squarely so held.

[**16] **5. Subjective decision-making process**

The class that plaintiffs seek to represent would include Hispanic farmers who [*13] suffered discrimination at the hands of county agents or county committees - hundreds and perhaps thousands of decision-makers in who knows how many of the 2700 county offices nationwide that number Hispanic farmers among their clientele. *Garcia I*, 211 F.R.D. at 22. As so described, the class presents insurmountable problems for plaintiffs in meeting what the Fourth Circuit has called the "critical" need to identify "the locus of autonomy in making the challenged . . . decisions." *Stastny v. S. Bell Tel. & Tel. Co.*, 628 F.2d 267, 279 (4th Cir. 1980). *Compare id. with Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 598 (2d Cir. 1986) (commonality supported where "evidence was offered to show that many of the decisions affecting employees' opportunities for transfer, training and promotion were made by the same, central group of people. . . ."). *See also Webb v. Merck & Co.*, 206 F.R.D. 399, 406 (E.D. Pa. 2002) (finding class certification inappropriate where employment decisions were [**17] made by managers with varying authority in six facilities across five states); *Carson v. Giant Food, Inc.*, 187 F. Supp. 2d 462, 471 (D. Md. 2002) (finding class certification inappropriate when alleged

discrimination involved thirteen facilities in five towns or cities), aff'd sub nom *Skipper v. Giant Food Inc.*, 68 Fed. Appx. 393, 2003 WL 21350730 (4th Cir. 2003), *cert. denied*, 540 U.S. 1074, 157 L. Ed. 2d 744, 124 S. Ct. 929 (2003); *Zachery v. Texaco Exploration & Prod., Inc.*, 185 F.R.D. 230, 239 (W.D. Tex. 1999) (finding class certification inappropriate when alleged discrimination made by five hundred and twenty-three autonomous supervisors in fifteen states). That is why plaintiffs' argument for commonality has focused from the beginning on the subjectivity of USDA's county committee decision-making process. Plaintiffs must either bring their claims under the "entirely subjective" rubric that the Supreme Court thought might "conceivably" satisfy Rule 23(a) - or fail on their class certification motion.

Before 1997, USDA's regulations set forth seven eligibility criteria:

> (1) United States citizenship;
>
> (2) Legal [**18] capacity to incur loan obligations;
>
> (3) Education and/or farming experience (at least "1 year's complete production and marketing cycle within the last 5 years");
>
> (4) Character (emphasizing credit history, past record of debt repayment, and reliability) and industry to carry out the proposed operation;

(5) Commitment to carry out undertakings and obligations;

(6) Inability to obtain "sufficient credit elsewhere to finance actual needs at reasonable rates and terms. . . ."; and

(7) Farm size (not to be larger than a family farm);

7 C.F.R. 1941.12 (1997). *See also* 7 C.F.R. 1943.12 (1997). [4]

4 In March 1997, the regulations were amended to include eleven eligibility criteria and to make them generally more objective:

(1) United States citizenship;

(2) The legal capacity to incur loan obligations;

(3) Education and/or farming experience (at least "1 year's complete production and marketing cycle within the last 5 years");

(4) Character (emphasizing credit history, past record of debt repayment, and reliability) and industry;

(5) Commitment to carry out undertakings and obligations;

(6) Inability to obtain "sufficient credit elsewhere to finance actual needs at reasonable rates and terms. . . .";

(7) Farm size (not to be larger than a family farm);

(8) and (9) Loan history (restricting the number of prior years in which the applicant could have taken out a direct operating loan);

(10) No previous debt forgiveness causing a loss to the USDA; and

(11) No delinquency on any federal debt.

7 C.F.R. § 1941.12 (1998); 62 Fed. Reg. 9351, 9354 (Mar. 3, 1997). In February 2003, subsequent to my initial class certification decision in *Garcia I*, these regulations were amended again to eliminate the character and commitment criteria, deeming them "obsolete." 68 Fed. Reg. 7693, 7694 (Feb. 18, 2003).

The *pre-1997* criteria were in force during a good portion of the putative class period.

[**19] In addition to satisfying those criteria, a farmer also had to submit a Farm and Home Plan, which had to meet with the approval of [*14] the loan officer. A feasible plan is defined as:

> [A] plan based upon the applicant/borrower's actual production and expenses. These anticipated prices, including farm program the income from the farm operation, along provide the income necessary for an applicant/borrower to at least be able to:
>
> (a) Pay all operating expenses and all projected farm budget period;
>
> (b) Meet necessary payments on all debts; and
>
> (c) Provide living expenses for the borrower or a wage for the farm borrower which is in accordance with the essential family needs. Family members include the operator in the case of an entity, and the immediate members of the family who reside in the same household.

7 C.F.R. § 1941.4.[5] I concluded in *Garcia I* that some of these eligibility criteria, such as "character" or "commitment," are obviously subjective, while others, such as citizenship, legal capacity, inability to obtain credit elsewhere, and farm size, should be classified as objective. I also ruled that the eligibility factors added in 1997 [**20] were objective: loan history, lack of previous debt forgiveness, and no delinquency on any federal debt. Overall, I concluded that, because the decisionmaking process was guided by a number of objective factors, footnote 15 was not triggered.

5 This provision was in force for a good portion of the putative class period.

Plaintiffs ask me to reconsider that overall conclusion, insisting that, of the seven factors set forth in the pre-1997 regulations - citizenship, legal capacity, education/experience, character, commitment, inability to obtain credit elsewhere, and farm size - only citizenship and legal capacity are truly objective. Plaintiffs argue that the "inability to obtain credit elsewhere" criterion, which I found to be objective in *Garcia I*, is actually open to subjective interpretation and application. The regulation provides that an applicant is eligible for a loan only if he or she could not obtain sufficient credit elsewhere to "finance . . . actual needs at reasonable rates and terms, taking [**21] into consideration prevailing private and cooperative rates and terms in the community in or near where the applicant resides for loans for similar purposes and periods of time." 7 C.F.R. § 1941.6. Plaintiffs argue that there was considerable room for local officials to interpret this factor, because, they assert, for most of the time period relevant to this suit, county committees were responsible for determining what were an applicant's "actual needs," what constituted "reasonable rates and terms," and which legal institutions were deemed "near" the applicant's residence. Plaintiffs also maintain that county officials had discretion to define what constituted a "family farm." The applicable regulation defines a family farm as one which, *inter alia*, "produces agricultural commodities for sale in sufficient quantities so that it is recognized in the community

as a farm rather than a rural residence." 7 C.F.R. § 1941.4. Plaintiffs also assert that approximately one-third of the examined loan rejections were done "on the basis of character or other similarly highly subjective criteria." Pls.' Mem. Ex. 7. And, plaintiffs place considerable [**22] emphasis on the USDA requirement that Farm and Home Plans be "feasible." Infeasibility appears to have been the reason given for more than half of the loan rejections plaintiffs have been able to review. The feasibility determination is guided by a number of objective inputs, however, including the applicant's own records of the farming operation's actual production and expenses. 7 C.F.R. § 1941.4. These records are combined with other estimates of actual prices to determine feasibility. *Id.* Even plaintiffs' anecdotal evidence shows that feasibility was grounded, at least in many cases, on objective financial data. *See* Pls.' Mem. Ex. 7.

Many of plaintiffs' arguments for reconsideration of my commonality finding are well [*15] taken, and taken together they do increase the subjectivity quotient of the USDA processes. The question is, have plaintiffs succeeded in raising the subjectivity quotient to the point where it can be said to be "entirely subjective"? The answer is no. Am I treating the words "entirely subjective" literally, as revealed truth? Again, no. Indeed, there can be no satisfactory resolution to the dispute about just how subjective is "entirely [**23] subjective" within the meaning of the Supreme Court's oracular *Falcon* footnote (which is dicta anyway). Judge Huvelle recently found the test to have been met in

McReynolds v. Sodexho Marriott Services, Inc., 208 F.R.D. 428, 441-42 (D.D.C. 2002), an employment case in which the choice of hiring and promotion criteria was left entirely to the individual discretion of thousands of decisionmakers at thousands of sites across the country. The line may not be clear, but whatever can be said about the USDA processes for making loans and giving disaster relief to farmers, they are (or were) certainly not so subjective as that, or as the process recently described in *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 189, 2004 WL 1385490 (N.D. Cal. 2004).

6. *Commonality within proposed subclasses*

Plaintiffs appear to be arguing that several of the subclasses they propose to define and seek to represent meet the standard for commonality wholly apart from any analysis of subjectivity. They assert that:

> ."Thirty-four named plaintiffs were either denied applications altogether or refused requested assistance in completing the [**24] loan application." Pls.' Mem. Ex. 8.

The stories of those 34 plaintiffs include many variations. One plaintiff was told to apply first to private banks; another was told that he did not have enough collateral and was not "offered" an application; another was told no disaster relief funds were available; another was treated rudely and was refused assistance in filling out the necessary forms. These are, essentially, thirty-four anecdotes about

poor treatment given to individual Hispanic farmers at eight of USDA's 2700 offices.

> .USDA "discouraged Hispanic farmers from availing themselves of farm credit by delaying the processing of their loan applications." Pls.' Mem., at 34.

A narrative presented in Exhibit 9 of Plaintiffs' Memorandum asserts that 28 of the 35 named plaintiffs for whom discovery has been received experienced "significant delays in receiving benefits related to farm programs," and that these delays were "in violation of the dictates of law and the dictates of morality." The material submitted in support of this claim consists of stories of bureaucratic delays, each one different from the other.

> .USDA "discouraged Hispanic farmers [**25] from availing themselves of farm credit by delaying or denying loan servicing." Pls.' Mem., at 37.

Here again the individual stories of the named plaintiffs are anecdotes of bureaucracy, geographically dispersed, and quite different one from another. *See* Pls.' Mem. Ex. 11.

> . USDA "discriminated against Hispanic farmers through the misuse of supervised bank accounts." Pls.' Mem. Ex. 10.

The deposit of loan proceeds or disaster payments funds into supervised bank accounts ("SBAs")

imposes significant burdens on farmers. SBA's should be used only temporarily "to help the borrower learn to properly manage his/her financial affairs" and normally not for more than a year. 7 C.F.R. § 1902.2(a)(6), (a)(4). Plaintiffs allege that SBA's are frequently imposed on Hispanic farmers only because they cannot speak English, for no reason related to their farming experience or ability to manage their financial affairs, and for periods of longer than a year. That allegation is serious and comes closer than any of the others to fulfilling the requirements for class treatment. It may be that, as the plaintiffs pursue their individual cases facts [**26] will emerge that could support class treatment of this claim in individual offices or in larger districts. *Cf. Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (finding class certification inappropriate for "immature" tort that could best be first developed in individual litigation). On the basis of the record in its present state of development, [*16] however, even if the SBA issue provided the requisite commonality, the requirements of Rule 23(b) have not been satisfied.

7. Rule 23(b) questions

Even if plaintiffs' proposed subclasses satisfy the commonality requirement of Rule 23(a)(2), they do not pass muster under Rule 23(b)(2) or Rule 23(b)(3).[6] Plaintiffs have done what they can to shore up their claim to represent a valid Rule 23(b)(2) class by seeking broad and carefully tailored injunctive relief in their proposed third amended complaint, [7] but their assertion that USDA "has

acted or refused to act on grounds generally applicable to the class" depends upon the same "one practice" and "single actor" theories by which plaintiffs have sought to establish Rule 23(a) commonality, and which have already been rejected. As for Rule 23(b)(3), [**27] the discovery difficulties that have been encountered in this case and the diversity of the plaintiffs' anecdotal support for their class certification motion underscore my observations in *Garcia I* that, if this case were permitted to proceed as a class action, it would "quickly devolve into hundreds or perhaps thousands of individual inquiries about each claimant's particular circumstances," and that "even if the presence of classwide discrimination were established, individual issues would be much more important to any claimant's recovery." 211 F.R.D. at 24. The history of the *Pigford* (black farmers) class action litigation [8] amply demonstrates that the certification of a plaintiff class to resolve decades of disputes about loans made or not made and disaster relief provided or not provided to thousands of individual farmers, working under disparate conditions and submitting applications to hundreds of different decision-makers (to say nothing of loan applications offered or not offered, loan applications delayed or not delayed, supervised bank accounts required or not required, and loan servicing provided or not provided), would be only the beginning of a lengthy [**28] and difficult process in which, as it turns out, it is the "questions affecting only individual members" that predominate. *See* Fed. R. Civ. P. 23(b)(3).

6 I recognize that since *Garcia I* the parties have focused their briefs on Rule 23(a)(2) commonality and imagine that plaintiffs might have more to say about Rules 23(b)(2) and (b)(3). I do not believe that yet another round of briefing would be productive, however.

7 And see Submission of Plaintiffs Concerning the Nature of the Injunctive Relief Sought by Plaintiffs' Proposed Third Amended Complaint, filed September 2, 2004.

8 *Pigford v. Veneman*, 266 F. Supp. 2d 105, 1:97-cv-01978-PLF (D.D.C. 2003)

8. ***Further discovery***

Plaintiffs will object - have already objected - that the denial of class certification at this point is uninformed by the information they might be able to develop through the broad discovery program that has been denied them until now, and that to restrict their discovery to unhelpful and [**29] uninformative USDA databases and to the loan files of their own clients unreasonably limits their ability to demonstrate the broader pattern of discrimination that they believe has existed over the last twenty years of USDA administration of farmers' loan and disaster relief programs. That objection is overruled. What plaintiffs have been able to assemble and present so far does not give rise to probable cause to believe that a searching and expensive discovery program would unearth sufficient evidence of commonality to support class certification. The examination of individual loan files requested is

labor intensive, time consuming, and is no different, or little different, from the kind of discovery that would be necessary to deal with these cases individually.

9. *Amendment of the complaint*

Plaintiffs' proposed Third Amended Complaint, as already noted, would add five subclasses of plaintiffs and assert prayers for injunctive relief. Leave to amend pleadings is to be "freely given when justice so requires." Fed. R. Civ. P. 15(a). Because the ruling set forth in this Memorandum Order alters the landscape of this case, however, [**30] the appropriate course is to deny leave to amend, without prejudice.

* * * *

[*17] For the reasons set forth above and in *Garcia I* it is

ORDERED that plaintiffs' motion for class certification [18], as renewed or supplemented by plaintiffs' memorandum on the subject of commonality [107], is **denied**. It is

FURTHER ORDERED that plaintiffs' motion for leave to file a third amended class action complaint [108] is **denied without prejudice**. It is

FURTHER ORDERED that defendant's motion to strike [131] is **denied**. And it is

FURTHER ORDERED that further proceedings in this case are **stayed** pending further order of the Court.

JAMES ROBERTSON

United States District Judge

ROSEMARY LOVE, et al., Plaintiffs, v. ANN VENEMAN, Secretary, U.S. Department of Agriculture, Defendant.

Civil Action No. 00-2502 (JR)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

224 F.R.D. 240; 2004 U.S. Dist. LEXIS 19514

September 29, 2004, Decided

SUBSEQUENT HISTORY: Petition granted by *In re Love*, 2004 U.S. App. LEXIS 26408 (D.C. Cir., Dec. 16, 2004)

Petition granted by *In re Love*, 2005 U.S. App. LEXIS 3253 (D.C. Cir., Feb. 23, 2005)

Affirmed in part and remanded in part by *Love v. Johanns*, 2006 U.S. App. LEXIS 5390 (D.C. Cir., Mar. 3, 2006)

PRIOR HISTORY: *Love v. Veneman*, 2001 U.S. Dist. LEXIS 25201 (D.D.C., Dec. 13, 2001)

DISPOSITION: Class certification denied. Matter stayed.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff female farmers filed a class action against defendant, the Secretary of the U.S. Department of Agriculture

(USDA), alleging that the USDA had discriminated against them by refusing to issue farm loans and to provide loan servicing and loan continuations to them because of their sex. The farmers sought to certify two subclasses as defined in their amended complaint.

OVERVIEW: The farmers sought to certify subclasses comprised of women farmers who were not allowed to apply for loans, and those who applied and were denied loans due to their gender. The court found that the farmers could have easily met the Fed. R. Civ. P. 23(a) numerosity and adequacy of representation requirements. A prior ruling of the court prevented the farmers from establishing commonality based upon the USDA's past failure to investigate civil rights complaints filed by female farmers. The court found that the farmers failed to meet Rule 23(a) commonality and typicality requirements and also could not show, as required by Rule 23(b)(2), (3), that the USDA had acted in a manner generally applicable to each subclass, or that questions of law or fact common to the class members predominated over questions affecting the individual members. The farmers relied primary upon anecdotal evidence; their statistical evidence did not permit an inference that members of the class were subjected to a common, pervasive policy of discrimination. The farmers' claims for money damages clearly predominated over their claim for equitable relief, making certification inappropriate under Rule 23(b)(2).

OUTCOME: The court denied the farmers' motion for certification and stayed the proceedings to allow

the farmers to seek appellate review of the class certification question. The court noted that, if asked to do so, it would certify its earlier order for interlocutory appeal.

CORE TERMS: commonality, class certification, certification, farm, farmers, loan application, injunctive relief, subjective, subjectivity, predominate, gender, class action, money damages, settlement, subclasses, pervaded, spectrum, individual members, declaratory, declarations, typicality, geographic, dispersal, putative, closer, questions of law, gender discrimination, civil rights, failure to meet, failure to investigate

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Joshua Z. Rabinovitz and Thomas William Millet, U.S. DEPARTMENT OF JUSTICE, Civil Division, Washington, DC, for Defendant ANN VENEMAN.

JUDGES: JAMES ROBERTSON, United States District Judge.

OPINION BY: JAMES ROBERTSON

OPINION

[*241] **MEMORANDUM ORDER DENYING CLASS CERTIFICATION**

In this suit, Rosemary Love and a number of other named plaintiffs, all women farmers, complain of gender discrimination on the part of the United States Department of Agriculture over the past 23 years. They allege that, from January 1, 1981 until December 31, 1996, and again from October 1998 until the present, [1] they were refused [*242] USDA farm loans, loan servicing and loan continuation, and even refused farm loan application forms, because they were women. The plaintiffs seek to represent a class of women similarly [**2] situated, and they have moved for certification of two of the three subclasses defined in their third amended complaint.

1 The 21-month gap has to do with a statute of limitations question that is not germane to the motion now before the Court.

This is one of three companion cases filed after the settlement of Pigford v. Veneman, 1: 97-cv-01978-PLF (D.D.C.), the Black farmers case. The other two, Keepseagle v. Veneman, 1: 99-cv-03119-EGS (D.D.C.), and Garcia v. Veneman, 1: 00-cv-02445-JR (D.D.C.), were filed on behalf of Native American and Hispanic farmers, respectively. Judges Friedman and Sullivan granted class certification motions in Pigford and Keepseagle, after finding that USDA had acted or refused to act upon

grounds generally applicable to the plaintiff classes in those cases, in part because, for nearly twelve years during the Reagan and first Bush administrations, the Civil Rights Office within USDA was virtually shut down and farmers' claims of discrimination were not investigated [**3] or simply ignored. In Garcia and Love, however, I ruled that plaintiffs' allegations of failure to investigate civil rights complaints did not state a claim under the Equal Credit Opportunity Act or the Administrative Procedure Act. That ruling, which has now been appealed, [2] effectively means that plaintiffs in Garcia and Love must seek to satisfy Rule 23(a)'s commonality requirement in some other way.

> 2 My order of September 10, 2004, in Garcia invited the plaintiffs to seek certification of that question for an interlocutory appeal under 28 U.S.C. 1292(b). They have now done so.

It should be noted at the outset that the numerosity and adequacy of representation requirements of Fed. R. Civ. P. 23(a) are not at issue here. They are virtually conceded by the government, and, if they have not been, I find that the putative plaintiff class is so numerous that joinder of all members is impracticable and that the representative [**4] parties will fairly and adequately protect the interests of the class. Plaintiffs' problem lies with the second and third requirements of Rule 23(a), that there be "questions of law or fact common to the class, [and] that claims or defenses of the representative parties [be] typical of the claims or defenses of the class." Those two

requirements are analytically different from one another, *see Bynum v. District of Columbia*, 214 F.R.D. 27, 34 (D.D.C. 2003)(commonality refers to the claims of members of the class, while typicality focuses on whether class representatives assert the claims that are common), but they are usually treated together, and there is no reason to separate them in this case.

Plaintiffs' third amended complaint identifies three sub-classes of women farmers--those who were denied loan applications because of their gender, those who applied for loans but never received them because of their gender, and those who obtained at least one farm loan but experienced delays or difficulty in obtaining loan servicing because of their gender. The present motion seeks certification only of the first two. The questions presented by the motion and the government's [**5] opposition are these: Have plaintiffs met the prerequisite commonality (and typicality) requirements of Rule 23(a)? If so, have they satisfied either or both of the requirements of Rules 23(b)(2) and 23(b)(3), that USDA has acted in a manner "generally applicable to the class, consequently making entry of declaratory or injunctive relief appropriate" and that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members"? Because I find here, as I have twice found in the Garcia case, 211 F.R.D. 15 (Garcia I), and Order of September 10, 2004 (Garcia II), that all of these questions must be answered in the negative, the motion for class certification will be denied.

1. Rule 23(a) commonality Plaintiffs have assembled an impressive collection of sworn statements asserting that a great many women have been flatly refused farm loans and even loan application forms in some of USDA's some 2700 county offices over the last 22 years. They concede that these declarations are anecdotal but assert that they are "typical and representative of a [*243] national problem," Plaintiff's Memorandum in Support of the [**6] Motion for Class Certification (Pltfs' Memo) at 9. Plaintiffs also offer a statistical argument that "women farm operators have received fewer numbers of loans and less loan dollars than they should have received," *id.* at 11.

In this case, as in the Garcia case, the parties have struggled with the Supreme Court's decision in *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 72 L. Ed. 2d 740, 102 S. Ct. 2364 (1982), and particularly with the Court's dictum, 457 U.S. at 159 n.15, that commonality might "conceivably" be established by "significant proof" that the defendant

> "operated under a general policy of discrimination ... if the discrimination manifested itself in ... practices in the same general fashion, such as through entirely subjective decisionmaking processes."

Falcon, of course, is not exactly on point. It involved an "across the board" claim of discrimination (one employee seeking to represent the discrimination claims of all), and the Court was particularly

concerned about the class plaintiff's claim to represent both employees and applicants. Falcon was applied and explained, however, in *Hartman v. Duffey*, 305 U.S. App. D.C. 256, 19 F.3d 1459, 1472 (D.C. Cir. 1994), [**7] a case much closer to home:

> As Falcon made clear, there is more to a showing of commonality than a demonstration that class plaintiffs suffered discrimination on the basis of membership in a particular group .... While in a case alleging intentional discrimination, such as this one, a plaintiff need not isolate the particular practice and prove that such practice*caused* the discrimination, plaintiffs must make a significant showing to permit the court to infer that members of the class suffered from a common policy of discrimination that pervaded all of the employer's challenged employment decisions.

In my initial denials of class certification in this case and in Garcia, I focused on the geographic and organizational dispersal of the decision makers at USDA who denied farm loans or refused application forms and on the question of whether USDA's criteria for making loans to farmers were "entirely subjective." Now pressing their arguments on those points, the plaintiffs urge that the "entirely subjective" language must not be interpreted inflexibly and that "decentralized decision making should not be and is not a*per se* bar to a finding of commonality, [**8] "Pltfs' Memo at 29. They are

correct, it seems to me, on both counts. Each factor, the geographic and organizational dispersal of decision makers, and the degree of subjectivity in the decision making criteria, describes a spectrum.

The record of this case, however, describes a fact pattern further from the "entirely subjective" end of the subjectivity spectrum, and closer to the "completely scattered" end of the geographic dispersal spectrum, than plaintiffs would have it. The declarations submitted by the plaintiffs might have been sufficient to support certification of subclasses of women who suffered discrimination at the hands of particular county committees or extension office officials, such as in Coffee County and Douglas County, Georgia, Jefferson Davis County, Mississippi, and Jefferson County, Arkansas, see Memorandum of Points and Authorities in Opposition to Class Certification Motion (Deft Memo) at 17 n.13. But they do not amount to the "significant showing" required by *Hartman, supra*, that would "permit the Court to infer that members of the class suffered from a common policy of discrimination that pervaded all of the ... challenged ... decisions" nationwide, [**9] as the government correctly points out, citing a string of cases to support the proposition that "the clear weight of authority examining decentralized decision making acknowledges that it 'cuts against any inference for class action commonality.' *Stastny v. Southern Bell Co.*, 628 F.2d 267, 279 (4th Cir. 1980)." Deft Memo at 8.

As for subjectivity, although plaintiffs are certainly correct that the criteria set forth in USDA's

regulations for making farm loans during the years in question were subjective in many of their parts, the existence of non-subjective criteria cuts against the inference that there was a "common policy of discrimination that pervaded all of the ... challenged ... decisions." *Hartman* 19 F.3d at [*244] 1472.[3] A number of the reasons given to plaintiffs' declarants for the disapproval of their loans--failure to meet collateral requirements, poor credit, insufficient income, see Deft Memo at 12-13, nn.8-10--register more nearly at the "objective" end of the subjectivity spectrum.

> 3 The "subjectivity quotient" of USDA's decision-making process is discussed in Garcia II, 224 F.R.D. 8, 2004 U.S. Dist. LEXIS 18400 at *22, slip op. at 12-19, and need not be repeated here.

[**10] Nor do the cases upon which plaintiffs rely provide as much support as plaintiffs suggest. The first one, *Cook v. Billington*, 1992 U.S. Dist. LEXIS 12519, No. 82-0400, 1992 WL 276936, at *4-5 (D.D.C. Aug. 14, 1991), is not a class action case. *Caridad v. Metro-North Commuter R. R.*, 191 F.3d 283, 291-92 (2d. Cir. 1999) (a decision annotated with an impressive list of "disagreed with," "declined to follow" and "distinguished" citations) involved a single employer and a district judge who apparently thought that the employer's policy of delegating discretionary authority to supervisors precluded a finding of commonality and typicality. *Buycks-Roberson v. Citibank Fed.. Sav. Bank*, 162 F.R.D. 322, 330, 331 (N.D. Ill.) (alleging "redlining" in the granting or denial of home mortgage loans) is

analytically quite similar to the present case, but the judge in that case granted class certification only for injunctive relief under Rule 23(b)(2), a ruling that our Court of Appeals has found to be at least problematical, see infra. In *Shores v. Publix Super Mkts.., Inc.*, 1996 U.S. Dist. LEXIS 3381, No. 95-1162-CIV-T-25(E), 1996 WL 407850, at *4 (M.D. Fla. Mar. 12, 1996), [**11] *Arnett v. Am. Nat'l Red Cross*, 78 F.R.D. 73, 76 (D.D.C. 1978) (a pre-Falcon decision), *Hyman v. First Union Corp.*, 982 F. Supp. 1, 5-7 (D.D.C. 1997), and *Thomas v. Christopher*, 169 F.R.D. 224, 237-38 (D.D.C. 1996), allegations of centralized employment practices provided the necessary commonality. Perhaps the best language for plaintiffs' view of the commonality issue is found in *Staton v. Boeing Co.*, 327 F.3d 938, 953 (9th Cir. 2003), but plaintiffs have misstated the posture of the case, which is very important to understanding the holding: it was not Boeing that objected to class certification, but a group of class members dissatisfied with a class action settlement that Boeing had an interest in preserving. The Ninth Circuit upheld the commonality determination, but it rejected the settlement. (*Thomas v. Christopher*, supra, was also a settlement.)

It is true, as plaintiffs' assert, that the combination of "excessive (albeit not entirely) subjective decision making, coupled with evidence tending to show that the process results in a pattern and practice of discrimination, will provide [**12] the basis for finding of commonality," Pltf Memo at 27-28. The statistical showing plaintiffs have offered, however, does not significantly change the anecdotal

nature of the facts recited in the declarations. The fact that "women comprised approximately 6.9 percent of the farm operators but received only 3.2 percent of the credit lent," Pltf Memo at 2 (see expert report of Patrick M. O'Brien (Jan. 12, 2004), at 6), has meaning only if we know how many women farmers and how many men farmers applied for loans, and we do not.

Defining putative subclasses as plaintiffs have in their third amended complaint--"women who were denied applications to apply for farm loans on the basis of gender" and "women who actually applied for farm loans, but were denied them on the basis of gender"--might seem to satisfy the requirement of the commonality cases as a matter of form, but it begs the precertification question of substance posed by the Hartman decision, namely, whether there has been a substantial showing that would permit the inference that members of the class suffered from a common policy of discrimination that pervaded all of the challenged decisions. In my view, there [**13] has not been such a showing.

2. Rule 23(b) requirements If Rule 23(a) commonality were the only issue to be resolved on this motion, the question of whether or not to certify plaintiffs' two sub-classes would be a considerably closer one. But the Rule 23(a) factors are only prerequisites--first steps in the certification analysis. The requirements of Rule 23(b) are more exacting.

a. Rule 23(b)(2) analysis requires a determination of whether the party opposing the

class (USDA) has acted in [*245] a manner "generally applicable to the class, consequently making entry of declaratory or injunctive relief appropriate." Plaintiffs say yes, simply asserting without analysis that "USDA's conduct --through the county committees and other local county officials -- is 'generally applicable' to the entire class of women who were discriminated against in the distribution and review of farm loan applications ...." Deft Memo at 43. Now that plaintiffs have defined the class(es) they seek to represent as women who have been discriminated against that assertion becomes quite plausible. Defendants' nevertheless insist that the answer is no: "Plaintiffs do not challenge a defined policy [**14] or clearly delineated practice adopted by USDA all farm credit programs. Rather, they challenge thousands of individual loan decisions made over two decades in approximately 2700 county offices by thousands of different USDA officials." Deft Memo at 23. Plaintiffs have the better of this argument. They do assert that responsibility for those thousands of individual loan decisions (and decisions about whether or not to give loan application forms to women) lies centrally with USDA, because USDA abetted or failed to prevent the unlawful acts of local officials or county committees for 22 years, even if only by looking the other way. Successfully arguing the general applicability of USDA's failure to act and the appropriateness of injunctive relief is only necessary for Rule 23(b)(2) certification, however. It is not, by itself, sufficient.

It is universally held, although with differences from circuit to circuit, that Rule 23(b)(2) certification is inappropriate where claims for money damages predominate but permissible if the claim for money damages is "incidental" to the claim for equitable relief. In this case, as in the Garcia case, see 211 F.R.D. at 22-23, [**15] money damages are far from incidental. Plaintiffs acknowledge the problem, but they have not forsworn their claim for money damages. Instead, they have proposed alternatives adopted in other cases: granting Rule 23(b)(2) certification for the liability phase of the case, leaving open the question of (b)(2) or (b)(3) certification to the remedy phase, as Judge Sullivan did in Keepseagle, Deft Memo at 42-43; or granting "hybrid" certification provisionally now, (b)(2) for liability and (b)(3) for remedy, id. at 44, Deft Reply at 20.

The Keepseagle approach, certifying a plaintiff class only under Rule 23(b)(2) "without first determining if plaintiffs' claims for monetary relief predominate over their equitable claims," has been seriously questioned by a panel of the Court of Appeals, see *In re Veneman*, 353 U.S. App. D.C. 398, 309 F.3d 789, 795 (D.C. Cir. 2002). The idea of provisional "hybrid" certification is problematical as well and is implicitly called into question by In re Veneman's focus on the potential due process issue that arises if a no-opt-out (b)(2) suit is settled and an absent member of the plaintiff class then seeks to bring [**16] her own individual action for damages. Id. at 796, and *see Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 128 L. Ed. 2d 33, 114 S. Ct. 1359 (1994).

Because of those concerns, and my own my very clear view of the (b)(3) "predominance" issue that must be dealt with sooner or later in this case, I see no point in (b)(2) certification, unless it would be to "create the sort of highstakes situation that puts 'substantial pressure on the defendant to settle independent of the merits of the plaintiffs' claims,'" *In re Lorazepam & Clorazepate Antitrust Litig.*, 351 U.S. App. D.C. 223, 289 F.3d 98, 102 (D.C. Cir. 2002) (*citing Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 834 (7th Cir. 1999)--and that, I decline to do. If declaratory and injunctive relief were all that plaintiffs sought in this case, class certification would be unnecessary anyway. The adjudication of a claim of gender-based refusals of loans or gender-based refusals to distribute loan application forms brought by one or more individual plaintiffs could yield the injunctive relief these plaintiffs have prayed for (not to mention attorneys' fees) without class certification: requiring USDA to adopt lending [**17] practices in conformity with the requirements of the Equal Credit Opportunity Act and the Administrative Procedure Act, prohibiting USDA from discriminatory lending practices, and mandating an effective system for investigating and timely responding to complaints of gender discrimination. See Third Amended Complaint at 28-30; Deft Memo at 43.

[*246] b. Rule 23(b)(3) "Rule 23(b)(3)'s predominance criterion is far more demanding than the commonality requirement of Rule 23(a)." My discussion of that point in Garcia I, 211 F.R.D. 15 at 23-24, and see *Garcia II* 2004 U.S. Dist. LEXIS

18400, at 21-23, applies in this case exactly as it did to Garcia. Plaintiffs have adduced no evidence, and it is unlikely that they can do so, establishing that it is or ever was actually USDA policy to refuse to give loan application forms to women farmers, and so the adjudication of that claim will almost inevitably involve individual swearing contests. As for loan denials, the plaintiffs themselves have identified a number of different reasons given to women farmers, "ranging from alleged overt discrimination to failure to meet program qualifications regarding collateral, poor credit, or insufficient income. [**18] "Deft Memo at 12-13 and nn.7-9. To repeat an observation I made in *Garcia II*, 2004 U.S. Dist. LEXIS 18400, at 22-23:

> "The history of the Pigford (Black farmers) class action litigation amply demonstrates that the certification of a plaintiff class to resolve decades of disputes about loans made or not made ... to thousands of individual farmers, working under disparate conditions and submitting applications to hundreds of different decision-makers (to say nothing of loan applications offered or not offered ...), would be only the beginning of a lengthy and difficult process in which, as it turns out, it is the 'questions affecting only individual members' that predominate."

It is not an improper peek into the merits, cf. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974), see *Wagner v. Taylor*, 266

U.S. App. D.C. 414, 836 F.2d 578, 587 (D.C. Cir. 1987), to review the procedural history of the Pigford case and to recall the record of *Mavity v. Glickman*, 1: 00-cv-02518-JR (D.D.C.), and to conclude, as I have, that questions of fact common to members of the putative subclasses do not predominate over questions affecting [**19] only individual members in these USDA farm loan cases.

CONCLUSION

As in Garcia, I recognize that this order denying class certification, together with my earlier ruling that plaintiffs' claim of failure to investigate did not state a claim under the ECOA or the APA, fundamentally alters the posture of this case. I will accordingly order proceedings in this court stayed so that plaintiffs may seek appellate review of the class certification question, see Fed. R. Civ. P. 23(f), and, if asked to do so, I will certify my order of December 13, 2001, for interlocutory appeal.

* * * * *

For the reasons set forth above it is **ORDERED** that plaintiffs' motion for class certification [54] is **denied**. And it is **FURTHER ORDERED** that further proceedings in this case are **stayed** pending further order of the Court.

JAMES ROBERTSON

United States District Judge

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*** CURRENT THROUGH PL 111-62, APPROVED 08/19/ 2009 ***

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES

PART I. THE AGENCIES GENERALLY

CHAPTER 5. ADMINISTRATIVE PROCEDURE

SUBCHAPTER II. ADMINISTRATIVE PROCEDURE

Go to the United States Code Service Archive Directory

5 USCS § 559

§ 559. Effect on other laws; effect of subsequent statute

This subchapter [*5 USCS §§ 551* et seq.], chapter 7 [*5 USCS §§ 701* et seq.], and *sections 1305, 3105, 3344, 4301(2)(E), 5372,* and *7521* of this *title [5 USCS § 1305, 3105, 3344, 4301(2)(E), 5372,* and *7521*], and the provisions of section 5335(a)(B) of this *title [5 USCS § 5335(a)(B)*] that relate to administrative law judges, do not limit or repeal

additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, requirements or privileges relating to evidence or procedure apply equally to agencies and persons. Each agency is granted the authority necessary to comply with the requirements of this subchapter [*5 USCS §§ 551* et seq.] through the issuance of rules or otherwise. Subsequent statute may not be held to supersede or modify this subchapter [*5 USCS §§ 551* et seq.], chapter 7 [*5 USCS §§ 701* et seq.], *sections 1305, 3105, 3344, 4301(2)(E), 5372,* or *7521* of this *title [5 USCS §§ 1305, 3105, 3344, 4301(2)(E), 5372,* or *7521*], or the provisions of section 5335(a)(B) of this *title [5 USCS § 5335(a)(B)*] that relate to administrative law judges, except to the extent that it does so expressly.

15 U.S.C. § 704 (2000)

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 392.)

7 U.S.C. § 2279 note (2000)

TITLE 7—AGRICULTURE

AMENDMENTS

1991—Subsec. (a)(3). Pub. L. 102-237, § 1003(1), substituted "subsection" for "section".

Subsec. (c)(1)(C). Pub. L. 102-237, § 1003(2), inserted "program" after "agricultural".

Subsec. (d)(3). Pub. L. 102-237, § 1003(3), substituted "November 28, 1991" for "1 year after the date of enactment of this Act".

WAIVER OF STATUTE OF LIMITATIONS

Pub. L. 105-277, div. A, § 101(a) [title VII, § 741[, Oct. 21, 1998. 112 Stat. 2681, 2681-30, provided that:

"(a) To the extent permitted by the Constitution, any civil action to obtain relief with respect to the discrimination alleged in an eligible complaint, if commenced not later than 2 years after the date of the enactment of this Act [Oct. 21, 1998], shall not be barred by any statute of limitations.

"(b) The complainant may, in lieu of filing a civil action, seek a determination on the merits of the eligible complaint by the Department of Agariculture if such complaint was filed not later than 2 years after the date of enactment of this Act [Oct. 21, 1998]. The Department of Agriculture shall—

"(1) provide the complainant an opportunity for a hearing on the record before making that determination;

"(2) award the complainant such relief as would be afforded under the applicable statute from which the eligible complaint arose notwithstanding any statute of limitations; and

"(3) to the maximum extent practicable within 180 days after the date a determination of an eligible complaint is sought under this subsection conduct an investigation, issue a written determination and propose a resolution in accordance with this subjection.

"(c) Notwithstanding subsections (a) and (b), if an eligible claim is denied administratively, the claimant shall have at least 180 days to commence a cause of action in a Federal court of competent jurisdiction seeking a review of such denial.

"(d) The United States Court of Federal Claims and the United States District Court shall have exclusive original jurisdiction over—

"(1) any cause of action arising out of a complaint with respect to which this section waives the statute of limitations; and

"(2) any civil action for judicial review of a determination in an administrative proceeding in the Department of Agriculture under this section.

"(e) As used in this section, the term 'eligible complaint' means a nonemployment related complaint that was filed with the Department of Agriculture before July 1, 1997 and alleges discrimination at any time during the period beginning on January 1, 1981 and ending December 31, 1996—

"(1) in violation of the Equal Credit Opportunity Act (15 U.S.C. 1691 et seq.) in administering—

"(A) a farm ownership, farm operating, or emergency loan funded from the Agricultural Credit Insurance Program Account; or

"(B) a housing program established under title V of the Housing Act of 1949 [42 U.S.C. 1471 et seq.]; or

"(2) in the administration of a commodity program or a disaster assistance program.

"(f) This section shall apply in fiscal year 1999 and thereafter.

"(g) The standard of review for judicial review of an agency action with respect to an eligible complaint is de novo review. Chapter 5 of title 5 of the United States Code shall apply with respect to an agency action under this section with respect to an eligible complaint, without regard to section 554(a)(1) of that title."

Effective:[See Text Amendments]

United States Code Annotated Currentness

Title 15. Commerce and Trade

Chapter 41. Consumer Credit Protection (Refs & Annos)

Subchapter IV. Equal Credit Opportunity (Refs & Annos)

§ 1691. Scope of prohibition

(a) Activities constituting discrimination

It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction--

(1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract);

(2) because all or part of the applicant's income derives from any public assistance program; or

(3) because the applicant has in good faith exercised any right under this chapter.

(b) Activities not constituting discrimination

It shall not constitute discrimination for purposes of this subchapter for a creditor--

(1) to make an inquiry of marital status if such inquiry is for the purpose of ascertaining the creditor's rights and remedies applicable to the particular extension of credit and not to discriminate in a determination of credit-worthiness;[FN1]

(2) to make an inquiry of the applicant's age or of whether the applicant's income derives from any public assistance program if such inquiry is for the purpose of determining the amount and probable continuance of income levels, credit history, or other pertinent element of credit-worthiness as provided in regulations of the Board;

(3) to use any empirically derived credit system which considers age if such system is demonstrably and statistically sound in accordance with regulations of the Board, except that in the operation of such system the age of an elderly applicant may not be assigned a negative factor or value; or

(4) to make an inquiry or to consider the age of an elderly applicant when the age of such applicant is to be used by the creditor in the extension of credit in favor of such applicant.

(c) Additional activities not constituting discrimination

It is not a violation of this section for a creditor to refuse to extend credit offered pursuant to--

(1) any credit assistance program expressly authorized by law for an economically disadvantaged class of persons;

(2) any credit assistance program administered by a nonprofit organization for its members or an economically disadvantaged class of persons; or

(3) any special purpose credit program offered by a profit-making organization to meet special social needs which meets standards prescribed in regulations by the Board;

if such refusal is required by or made pursuant to such program.

(d) Reason for adverse action; procedure applicable; "adverse action" defined

(1) Within thirty days (or such longer reasonable time as specified in regulations of the Board for any class of credit transaction) after receipt of a completed application for credit, a creditor shall notify the applicant of its action on the application.

(2) Each applicant against whom adverse action is taken shall be entitled to a statement of reasons for such action from the creditor. A creditor satisfies this obligation by--

(A) providing statements of reasons in writing as a matter of course to applicants against whom adverse action is taken; or

(B) giving written notification of adverse action which discloses (i) the applicant's right to a statement of reasons within thirty days after receipt by the creditor of a request made within sixty days after such notification, and (ii) the identity of the person or office from which such statement may be obtained. Such statement may be given orally if the written notification advises the applicant of his right to have the statement of reasons confirmed in writing on written request.

(3) A statement of reasons meets the requirements of this section only if it contains the specific reasons for the adverse action taken.

(4) Where a creditor has been requested by a third party to make a specific extension of credit directly or indirectly to an applicant, the notification and statement of reasons required by this subsection may be made directly by such creditor, or indirectly through the third party, provided in either case that the identity of the creditor is disclosed.

(5) The requirements of paragraph (2), (3), or (4) may be satisfied by verbal statements or notifications in the case of any creditor who did not act on more than one hundred and fifty applications during the calendar year preceding the calendar year in which the adverse action is taken, as determined under regulations of the Board.

(6) For purposes of this subsection, the term "adverse action" means a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested. Such term does not include a refusal to extend additional credit under an existing credit arrangement where the applicant is delinquent or otherwise in default, or where such additional credit would exceed a previously established credit limit.

(e) Appraisals; copies of reports to applicants; costs

Each creditor shall promptly furnish an applicant, upon written request by the applicant made within a reasonable period of time of the application, a copy of the appraisal report used in connection with the applicant's application for a loan that is or would have been secured by a lien on residential real property. The creditor may require the applicant to reimburse the creditor for the cost of the appraisal.

(Pub.L. 90-321, Title VII, § 701, as added Pub.L. 93-495, Title V, § 503, Oct. 28, 1974, 88 Stat. 1521, and amended Pub.L. 94-239, § 2, Mar. 23, 1976, 90 Stat. 251; Pub.L. 102-242, Title II, § 223(d), Dec. 19, 1991, 105 Stat. 2306.)

[FN1] So in original. Probably should not be hyphenated.

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END OF DOCUMENTS

Civil Action No. 00-2445 (JR)

TREATMENT OF MINORITY AND LIMITED RESOURCE PRODUCERS BY THE U.S. DEPARTMENT OF AGRICULTURE

HEARINGS
BEFORE THE
SUBCOMMITTEE ON DEPARTMENT OPERATIONS, NUTRITION, AND FOREIGN AGRICULTURE
AND THE
COMMITTEE ON AGRICULTURE

COMMITTEE ON AGRICULTURE
HOUSE OF REPRESENTATIVES
ONE HUNDRED FIFTH CONGRESS
FIRST SESSION

MARCH 19, JULY 17, 1997

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The CHAIRMAN, Now, Mr. Secretary.

STATEMENT OF HON. DAN GLICKMAN, SECRETARY, U.S. DEPARTMENT OF AGRICULTURE

Secretary GLICKMAN, Thank you very much.

First of all, I want to introduce who is with me here. On my right is my partner, the Deputy Secretary, Rich Rominger. And on my left is Pearlie Reed. Pearlie is the head of our Civil Rights action Team. Pearlie was Associate Chief of the Natural Resources conservation Service when I asked him to take this job around the first of the year, to begin to focus our attention on civil rights.

So Pearlie is now Acting Assistant Secretary for Administration and he has been our savior coming in and doing his best to clean up a problem that has existed for a very long time. A very difficult problem. One that has caused me, in terms of my personal time as well as attention and focus, more than any other issue the Department of Agriculture, and one that frankly we have barely scratched the surface on. And so it is, this is an important topic.

I served with you for many years, 18 years, I don't think this topic was ever discussed at a formal hearing, so I commend you for having this hearing. Abraham Lincoln called USDA "the people's department," when he created this department in 1862. We are working hard to restore the full lustre of that name.

I'd like in particular to thank those on this committee and elsewhere who have shown a deep, personal commitment to and involvement in the civil rights struggle at USDA. The support of Congress, and in particular, this committee will be crucial to the progress we make. And I would tell you right now, we need your help and your support and your involvement to work through this particular issue.

It was a little over 2 years ago when I appeared before this committee to first talk about my plans for USDA. We talked about wheat and cattle, crop insurance, research, conservation. We talked about Kansas and California, just two States that Mr. Rominger and I care about. We did not focus on civil rights. Quite honestly if there was one ambush awaiting me in this job, that's it.

Today I spend as much, if not more, of my time dealing with civil rights matters as I do any specific farm program. And the reason is simple enough. We have a long history of both discrimination and perceptions of unfairness that go literally back to the middle of the 19th century. For those who look back on the progress made in the 1960s of the historic civil rights laws passed in that time and think we got the job done, I can say just from my experiences at USDA, we do not yet fully practice what we preach.

I've talked to people who have lost their farm. Good people, who lost their family land not because of a bad crop, not because of a flood, but because of the color of their skin. I've talked to employees—dedicated public servants—who have been humiliated, abused and then punished for speaking

up. I want to close this chapter of USDA's history. My goal is to get USDA out from under the past and have it emerge in the 21st century as the Federal civil rights leader.

The American farmer and the American people deserve nothing else. I appear before you today proud of the progress we have made in calling attention to the problem of starting to focus ourselves on solutions and getting key changes quickly in place. But I also appear before you today having undergone a reality check as to the massive amount of time, resources, people, power and leadership, both at USDA and in Congress, that it is going to take to get the job done right.

This is an extraordinarily complicated problem that has taken decades and decades and decades to build to this situation. So we are committed to resolving, but we do need your help as well. I also want to emphasize the overwhelming majority of our employees are committed to treating their co-workers and customers with dignity and respect. The institutional and personnel problems which continue to afflict the Department, should not demean the majority of our committed and capable staff.

By and large, USDA employees are dedicated, fair-minded, overworked and under paid.

Like discrimination in many of America's public and private institutions, civil rights problems at USDA are not going to disappear overnight. If there were easy solutions, I would assure you we

would not be sitting here today. But the fact is, there is no silver bullet. We are going to have to get through this the old fashioned way, with our sleeves rolled up and a whole lot of people doing a whole lot of work.

And our efforts are already well underway. As most of you know,, it's been 5 months since the release of USDA's Civil Rights Action Team Report. And by the way, that process got started around Christmas, and within a record 60-day time period, it was finished. We had 12 listening sessions around the country to hear from farmers, ranchers, employees, rural residents and community leaders.

Our report listed 92 specific recommendations to improve the civil rights climate at USDA. To carry them out, we have organized 33 implementation teams, involving approximately 300 people, currently employees at USDA. Together they have logged tens of thousands of hours of work. We have a long way to go, but we have started down the road to a solution.

And I want to give you a progress report. Where progress could be made on my authority, we have moved quickly. I have made it a condition of employment, that every employee treat every co-worker and customer fairly and equitably with dignity and respect. No exceptions, no excuses. We have a new foreclosure policy. Now when a written civil rights complaint is lodged, the foreclosure is frozen wherever it is in the process until an independent review occurs and a judgement is made as to whether or not discrimination occurred.

We have a zero tolerance policy for reprisals against employees who file civil rights complaints. From now on, a three person panel made up of one union or an employee representative, one manager or a personnel staff and one mediator will investigate alleged reprisals and make binding recommendations.

I've also ordered that loan processing continue on accounts where a discrimination complaint is pending. Standing up for your rights should not disqualify someone from seeking a farm loan. If it is the loan processor facing the allegations, then another FSA, Farm Service Agency loan officer will be assigned to work with the applicant. If that loan cannot be approved, they get a meeting and a written letter of explanation. That last part helps clear up the problem and the perceptions.

Without question, part of the problem is economic. Smaller farmers of all ethnic backgrounds and all regions of the country are having an increasingly difficult time coping with the massive changes that are occurring in the structure of the Agriculture. Yesterday I announced the formation of a National Commission on Small Farms.

It will be headed by a former member of this committee, Harold Volkmer of Missouri. His commission will talk to folks around the country and pull together the thread of rural and economic conditions that affect America's small farms, and weave a national strategy to make our small farms as powerful a force in agriculture's future as they have been in the past.

I've asked their report be presented to me by September 30 and I look forward to sharing it with all of you and taking bold steps in that area as well.

Under the economic rubric, we will also propose legislation to modify certain provisions of the 1996 farm bill. We have worked very closely with Congresswoman Clayton and others to provide more flexibility in terms of assisting farmers who rely on USDA for farm operating credit. In my book, the 1996 farm bill went too far in restricting credit, particularly to those farmers who received a debt forgiveness and were denied an opportunity to work their way back to qualifying for assistance. That's even harsher than commercial credit standards and needs to be corrected.

USDA will also soon have an Office of Outreach, which may be the most visible evidence that we are serious about reaching out to customer whom we've neglected in the past. All our potential customers should get the information they need to use our programs and services. We also expect to soon fill the newly created position of Associate General Counsel for Civil Rights. This person will head a staff of attorneys who will be dedicated exclusively to the performance of civil rights functions.

These are just the highlights of what we have done to date, and they accomplish perhaps a third of the recommendations that were made in the report. You should all have a more complete accounting in the package of material that my staff has handed over to this committee. But I mentioned earlier a

reality check. Nowhere has it been more abrupt than in our efforts to resolve the backlog of nearly 2,300 civil rights complaints, 1,500 from employees and nearly 800 in our farm and rural development and other programs.

Some of them go back years. This shows the rift between civil rights and civil realities. I don't have to explain to anyone on this committee what's likely to happen to a small farmer who's denied a timely loan. Or the employee who has filed a complaint against his or her boss and then has to wait year after year for closure. I am not proud of our history. I must tell you that. I am not proud of our history, our institutional dedication, or commitment or our internal operations in the past 15 years in resolving these complaints. And that even includes time that I have been in this job.

Our organizational structure and institutional commitment to resolving program and personnel complaints have left a great deal to be desired. And quite frankly, neither past administrations nor past Congresses, including when I was in this body, devoted very much time to this issue at all. I do believe this is the first time in the modern history of Congress, that this committee on either side has held a hearing on this subject. And for that, you should be commended.

Since the Civil Rights Action Team Report, we have focused huge amounts of time and resources on resolving those complaints. We have settled 215 cases of alleged discrimination against employees and closed 89 cases on the program side. Of that 89,

four cases involved what I would characterize as significant settlements, adding up to a total, the four cases, of more than $2 million.

USDA stands ready to resolve quickly and fairly, legitimate civil rights complaints. And I stress the word legitimate, because we have an obligation to taxpayers to ensure the charges are warranted. We cannot simply settle for settlement's sake. We must investigate each charge. This is where we have hit the proverbial brick wall. A good part of the reason for the backlog is the fact that in 1988, USDA Civil Rights Investigation Unit was dismantled. We are just now in the process of hiring back those positions.

Currently, we are using contract investigators to help us sort through the backlog. We expect that a permanent staff will help us break up the logjam, but this will remain a lengthy, arduous process that is likely to take a year to wrap up responsibly. And I should mention, with me is Lloyd Wright who is the new head of our Office of Civil Rights.

Since Mr. Reed came on board, we have virtually an entire new team involved in the administration of these particular matters, and it's his job to break through this backlog and get it done responsibly. Once we get back to ground zero, we are working on ways to move the process along at a quick but fair clip, that allows all parties to move on with their lives.

So I would say that this leads me to perhaps my last issue, and that is the issue of building

accountability. We don't just want to fix what's wrong, we want to build an institution that consistently does what's right. That requires building more accountability into the system. In this area in particular, we are going to need to work very closely with this committee. We need to send a strong signal throughout our ranks that USDA is serious about institutionalizing proper civil rights enforcement up and down our ranks.

I've given Mr. Reed the authority to rate agency heads on their civil rights performance. It will no longer be a second tier consideration. We are also working to ensure that our civil rights objectives are incorporated into our performance management system, so that managers know what's expected of them and understand that they will be rated based on how well they live up to those expectations.

Finally, there is the question of the USDA structure which serves agriculture outside of Washington, the field structure. As an 18 year member of this body, from the great agricultural State of Kansas, I am under no delusions as to the political degree of difficulty of any legislative proposal to convert county employees to Federal employees. While this change was suggested in our Civil Rights Report, its origin is almost entirely based on general management concerns.

Our county field structure is far from resembling a Fortune 500 corporation. But as we downsize and streamline and all the rest that we have to do, I think a brief comparison is worthwhile. Right now we operate under two personnel systems

in our counties. A system of county-based employees and Federal employees, often in the same offices, all whose salaries are paid for by the Federal Government, Uncle Sam.

It wasn't even until about 10 years ago that I realized that county employees were paid by the taxpayers of the America just as Federal employees were paid by the taxpayers of America. They are all paid by the same people. In the same county office, we find both Federal and non-Federal employees all doing USDA work, side by side, but they do not technically have the same boss.

This is something that you would be hard pressed to find in the private sector, because it is that dreaded management consulting word, inefficient. Now what does that mean? We had a county committee, they are a grass roots connection and bring to the table hands-on farmers' knowledge of how Federal policies actually work. These men and women are like the Board of Directors. They care about the big picture, getting their rural communities and farmers the Federal resources they need. Seeing Federal conservation policies, rural development efforts and farm programs work in their county.

Their role in substantive policy and program matters would not be affected by this shift at all. This proposal will simply take the next logical step. It will recognize all the changes that are occurring. It will close the accountability gap on civil rights and it will create a more efficient and much less costly

field structure where everyone does what they do best.

County committees will be free to focus on the big picture, the program picture. And nuts and bolts personnel management will be carried out according to one national standard. Again, all these people are paid by the same people. They are all nationally taxpayer paid people. This will help create a more positive, consistent work environment for our field staff and a higher standard of service for all our customers.

Done right, it will also eventually save us the thousands of hours and millions of dollars we are putting out right now on the damages side of civil rights enforcement. I understand that the nature of a bureaucracy is to resist change. I understand too, that for decades this has been an untouchable issue and probably rightly so for the times. But today I am utterly convinced that we can do this the right way, and I am equally convinced that this is simply the right thing to do.

Our employees out on the front lines of this whole civil rights effort liken their work to trying to turn an elephant around using a pin. We are dealing with a large Federal bureaucracy. One that is scattered across almost every county in this country. We were the first decentralized government in this country. The Agriculture Department was set up and it was—the programs in the thirties were set up basically to run in a decentralized way, with a national set of policies. So we are located everywhere.

We are also dealing with civil rights, which involves laws and policies, but also people's hearts and minds. Some things change faster than others. It is not hard to draw the comparison to the President's "One American Initiative." On the one hand, racially healing is such a vast and squishy issue that few people have any real concrete ideas on where to begin. On the other hand, discrimination runs so completely counter to everything we stand for as a Nation, that the alternative, which is to do nothing, would be unthinkable.

Today President Clinton is talking to the NAACP and the National Association of Black Journalists about our options as a Nation. I am here talking to all of you. I have every confidence that these actions, if embraced by this Congress, will be extraordinarily positive for the Department of Agriculture. We, at USDA, are special in our advocacy for America's farmers and ranchers. These changes will make us even more effective.

We cannot change how every person treats every other person, but we can demand a basic respect for the human rights and dignity of our customers and employees. If we do, we will strengthen the people's Department and dramatically improve our ability to serve agriculture and the Nation.

Thank you, Mr. Chairman.

[The prepared statement of Secretary Glickman appears at the conclusion of the hearing.]

The CHAIRMAN. I thank you, Mr. Secretary, for an excellent statement. Does the Deputy Secretary or Mr. Reed have comments?

[No response.]

The CHAIRMAN. Not at this time. And they are available for questions. Thank you. I have several questions, but I would like to send them down to the Department. That will save some time for the rest of the committee members who have been patient to answer some of their questions.

At this point, I recognize Mr. Stenholm of Texas.

The STENHOLM. Mr. Secretary, I know that Mrs. Clayton has developed a bill with a number of provisions stemming from the Civil Rights Action Team Report and I look forward to working with her on that package. But I was wondering when we might be expecting a formal, legislative package with the eight or nine recommendations that now appear to need Congressional action?

Secretary GLICKMAN. Well, we have been working with Congresswoman Clayton, and based upon the early drafts, we support most of the provisions in the bill that we have seen. So it is my expectation that you will probably be hearing our position, as it relates to Congresswoman Clayton's bill.

Let me tell you a little bit. We're going through close-out sessions of the Civil Rights Action

Team Report. There were 92 recommendations, many of them involve legislative recommendations. So we have the implementation teams that I have been working with, since this is a grass roots effort and I need to complete that process before I finish a final decision on everyone of the legislative packages.

But working with her, I think that we have reached agreement on most of what she has prepared to date.

Civil Action No. 1:00CV02445

DECLARATION OF

ROSALIND GRAY

1. I am over 18 years of age and a United States citizen.

2. My business address is 607 Oneida Place, N.W., Washington, D.C.

3. I am a 1973 graduate of Howard University School of Law, a member of the Mississippi Bar and have practiced in many federal district courts. I am also a member of the Bar of the United States Supreme Court. From 1976 to 1986, as trial counsel and director for the Lawyers' Committee Municipal Services Equalization Project, I represented minorities in small, rural communities seeking to equalize municipal services. I have served as a consultant to the Legal Services Corporation. the Office of Revenue Sharing and the Departments of Justice and Housing and Urban Development. I have also served as Acting General Counsel to the U.S. Commission on Civil Rights and as Deputy General Counsel at the Equal Employment Opportunity Commission ("EEOC"). As Deputy General Counsel at EEOC. I managed the national litigation program and participated in the settlement of a number of major class actions. In addition. I have served as Associate General Counsel for the University of the District of Columbia where I represented the University in federal litigation and

administrative proceedings on employment discrimination and other labor claims. On July'13, 1998. the Secretary for the Department of Agriculture announced my appointment to serve as Director of Civil Rights.

4. The Office of Civil Rights ("OCR") has broad responsibility for implementing and coordinating all. Department of Agriculture ("USDA") nondiscrimination, civil rights, and equal opportunity efforts in connection with all USDA programs and activities, including programs and activities which are operated or sponsored by USDA and carried out by non-federal organizations. The OCR Director serves as the principal advisor to the Secretary and the Assistant Secretary for Administration on all matters related to equal opportunity and civil rights. The position description for the OCR Director is included as Exhibit 1.

OVERVIEW: USDA and Civil Rights

5. When I assumed my duties as OCR Director, the OCR could perhaps best be described as being in a state of confusion and disorder. The office had a history of failing to handle properly program and employee complaints. My task as a manager was further complicated by the fact that the OCR was newly organized and poorly staffed. Most of its employees had been reassigned from non-civil rights jobs or were new hires. and poorly prepared to undertake the responsibilities of the office. I soon realized that the goals established by the administration to organize the office. to reduce

complaints and to develop procedures for complaint processing while executing the other duties and responsibilities of the Director's Office would be one of the greatest challenges of my nevertheless welcomed the challenge and saw it as an opportunity to assist in addressing issues of USDA's long history of discrimination against minority farmers and the well-documented decline of minority farmers.

6. When I arrived at the Jamie Whiten Building, USDA's headquarters in Washington, D.C., the atmosphere resembled that of a recently desegregated institution. Minority men, whether farmers or employees, were greeted with suspicion. Minority females were largely hired in support or administrative positions. While the Clinton Administration sought to change some of this by appointing a number of minority employees to high-level positions at USDA, African American men who were appointed often saw the authority of their positions curtailed. Management involvement in the allegations against and removal of the former Secretary of Agriculture Mike Espy is but one example.

7. Almost forty years after the civil rights acts, black employees were still reluctant to frequent the cafeteria in the Whiten Building. Long-term black employees remembered when it had been segregated and still did not feel welcome. In fact. they did not feel comfortable in the building at all and came to the building as little as possible. Black senior executives told me that white females whom they saw daily were reluctant or declined to enter an

elevator when they were on it. Most minority employees in the main administration building were in low-grade positions and worked in the mailroom or technical support. White females reported they were afraid to walk corridors along the basement where a number of minority employees worked. I am not aware of any reported incidence of harassment.

8. Minority employees complained frequently of promotion denials. Senior minority employees struggled to maintain authority in their areas of management. White career employees used different standards of evaluation for minority managers and attempted to rate them unsatisfactorily for performances that earned their white counterparts outstanding ratings. Senior white career managers resisted integration of employment at higher grades.

9. In direct conflict with the EEOC, FSA personnel procedures provided for priority in hiring to be given to internal candidates and these procedures were still followed in many agencies. When white internal candidates were not selected. they invariably filed discrimination complaints. In one agency. when a minority female manager sought to diversify the senior executive staff. career managers met to complain and to prevent the Asian selectee from receiving the appointment. This was the USDA headquarters. Employees in the field reported that few, if any. of the civil rights or diversity changes initiated by the administration had been implemented in the field offices.

MANAGEMENT AND PERSONNEL ISSUES IN CIVIL RIGHTS

10. OCR employees resented my appointment and focus on program complaints. They believed that I had replaced a career employee and that my primary focus was not employee complaints. It is well to note that USDA's employment-complaint processing, though inefficient and ineffective, had never been eliminated as had program-complaint processing. Upon my arrival at OCR, I became aware that reducing the number of program complaints and establishing processing procedures for farm program complaints simply were not matters of concern to OCR staffers. Many of these employees were responsible for the poor service provided farm customers. Many of them were, at best, indifferent to the exclusion of minority farmers from USDA programs.

11. Indifference and incompetence produced poor records and ineffective case processing. While uncertainty about the number of cases and their status was clearly a controllable management issue, files were and remained in disarray. Few CR staffers understood complaint processing or even the rudiments of civil rights procedures. They seemed to care little about the consequences to farmers of their denial of services. To build a structure for complaint processing, I worked diligently with the technical staff to provide resources to complete the complaint tracking system. When employees' lack of understanding of complaint processing threatened to derail completion of the tracking system, I contracted

to draft processing procedures to be incorporated in the tracking system. When the system was deployed OCR employees complained that data entry for the tracking system was too time consuming and burdensome. Without my approval. employees eventually maintained two systems: 1) new cases were entered in the computerized tracking systems: and 2) existing cases were maintained in the old system. This dual tracking system eliminated their need to organize the old files. It also created the opportunity to maintain various and confusing categories of pending cases. The result was that the number of pending cases continued to be erroneously reported. In fact, if one did not know the category of case numbers to request, one could not obtain a clear picture of OCR's caseload. This basic failure had serious repercussions beyond the immediate office. Not only were there not accurate numbers for work and planning. but time and again, the OCR reported differing case numbers to the Secretary' and Congress. resulting in embarrassment for the administration and for me.

12. It was obvious that personnel changes were needed. The Secretary had approved the return of many of the OCR employees to their former agencies and was committed to hiring experienced civil rights personnel. The Department's Office of Personnel identified forty-five people who had been assigned to OCR who did not meet the qualifications for any position at the office. However, before the reassignments could be completed. they were aborted. The proffered reason was that the reassignments violated the settlement agreements

that had brought the employees to OCR initially: the real reason was that the agencies did not want these employees returned. Thus. although Congress had allocated additional funds for hiring new competent OCR employees, much of the additional funding was redirected to other divisions within the USDA. Many times, the department simply froze hiring. for OCR and used the funds earmarked for OCR for other purposes. With the high rate of turnover and frequent freezes on hiring, civil rights had no appreciable staff increases. It was not difficult to glean that civil rights enforcement simply was not a USDA priority.

13. Employees were antagonistic and not very helpful. Agency chiefs and supervisors generally resented the existence of the OCR and considered most efforts to enhance civil rights enforcement as infringements upon their authority, because previously, agency chiefs had been responsible for their own civil rights enforcement. Agency chiefs and supervisors complained that OCR interfered with their civil rights enforcement authority, threatened to expose their past efforts or lack thereof in the area of civil rights enforcement. Consequently, throughout my tenure, I was constantly confronted with agency heads and their deputies who resisted directly, or through the agency civil rights director, many of the changes I sought to implement.

14. While complaints continued to be filed in record numbers and the Secretary's office retrenched on commitments it had made to

customers and employees regarding civil rights enforcement, I struggled to reform the system of complaint processing.

15. The Office of General Counsel ("OGC") oversaw the civil rights process at USDA. When the OCR was created. OGC insisted that all attorneys hired for civil rights review and enforcement be housed with OGC. The resulting effect was that OCR still did not have independence in case processing. OGC's authority for a legal sufficiency review extended to every element of case processing and OGC's delays magnified the problems of civil rights enforcement. However, OGC was never held responsible for the problems created. Moreover, OGC civil rights attorneys were often as lacking in the knowledge of civil rights law as the OCR staff. There was constant conflict between the two offices.

16. Although OCR had responsibility for many activities, the remainder of this declaration will be limited to my observations of complaint processing for programs managed by the Farm Services Agency ("FSA") and the continuing need for reform.

PROGRAM DISCRIMINATION COMPLAINTS IN THE FARM SERVICES AGENCIES

17. The February 1997 Civil Rights Action Team ("CRAT") Report summarized charges by minority farmers that USDA had long tolerated discrimination in the distribution of program benefits and the misuse of power to influence land

ownership and farm profits. Minority farmers blamed the FSA for depriving them of the benefits of farm programs that have helped major producers survive the changes in agriculture. Based on thousands of complaints that were filed and the supporting documentation that I personally reviewed. I can confirm that the accusations contained in the CRAT Report are generally true. Despite ample warnings that minority farmers were being subjected to systematic discrimination at the local level in the delivery of credit and debt servicing. USDA has failed to exercise sufficient control over its field operations to address these lingering problems. I submit that there have been few effective steps taken to insure an equitable distribution of federal dollars to USDA customers. This is in large part due to the fact that there are constituents, more numerous than minority farmers, who oppose change. In addition, there has been less than a total commitment from the Department to correct the recognized inequities and almost none from the FSA. A leading feminist once said that discrimination will end when it is more profitable for corporations and institutions to treat their customers equitably than it is for them to discriminate. The same can be said for USDA.

18. Notwithstanding its protestations to the contrary, the USDA is not interested in an equitable distribution of funds from its farm programs to minority farmers. Indeed, there have been many opportunities for the FSA to change if that agency really desired equity for its farm customers.

19. When I arrived at USDA there were 1,088 cases identified as being backlogged or filed before 1997. In addition to the " backlogged" cases, there were approximately three hundred complaints that had been accepted and several hundred or so filings that awaited determinations. While not all filings would be accepted as complaints and not all complaints would yield findings of discrimination, the backlogged cases had been forwarded to OCR in a state of disarray.

20. Until 1997, the FSA had processed its own civil rights complaints. Based upon my first-hand knowledge, I can attest that many complaints were destroyed or not accepted at all. After FSA complaint processing was transferred to the OCR. the FSA was initially responsible for preparing a preliminary investigatory report. Even though the FSA had presumably forwarded complainant files to OCR, the files were often incomplete and OCR had to rely on FSA to provide documents and a response to each allegation. Within the USDA, the preliminary investigatory report prepared by FSA was considered more persuasive than the complainant's allegations even when the accused FSA official had a well-documented history of discriminating against minority farmers. In preparing the preliminary report. FSA would send its non-civil rights investigators to interview and often intimidate the complainant. When investigations were transferred to the OCR, reports of investigations were frequently deficient due to a lack of understanding of the farm programs. and the OGC's policy that no matter how blatant the discriminatory conduct might be, there

can be no discrimination unless the applicant is "eligible." To avoid finding a would-be applicant "eligible," county officials often simply refused to give minority farmers a loan application thereby making it impossible for the minority farmer to establish "eligibility" under the OGC's policy.

21. When I arrived and regrettably when I left. the OCR did not have, despite my best efforts. an effective civil rights enforcement program. In 1993. there were twenty employees responsible for civil rights compliance in the Department. In 1995. there were more than one hundred twenty employees. However, roughly half of that number was responsible for employment complaints. Of the fifty or sixty employees responsible for program complaints. about twenty three were temporary employees with no prior civil rights complaint experience. The administrative and support staff were comprised of temporary employees or detailees from other agencies.

22. To brine any case to conclusion, I personally had to become much more involved than I wanted to be. I reviewed investigatory reports looking for information that the farmers swore should have been included in their files. A familiar scenario soon emerged: The farmer charged discrimination; FSA replied that it had done everything "by the books."

23. Over time. I began to see geographical patterns emerge in the complaints. Black farmers in the "southern" states had already lost most of their

farm acreage. They complained of FSA's refusal to finance them after successful farming years. They complained of conspiracies between USDA and local white corporate farmers and developers to acquire their farms. Often the land had been auctioned and lost before their complaints were processed. It appeared that FSA bid at auctions infrequently. Consequently. the lost land was not available for repurchase by the fanner from FSA inventory.

24. In the midsouth. complaints alleged brazen conduct. In Arkansas and Alabama, for example, there were proven claims documented by OCR that FSA employees actually participated in schemes to deprive minority farmers of land ownership by refusing, loans and refinancing or simply failing to inform them of the availability of funding. A favorite scheme was to extend loans that FSA officers knew the farmer could not repay. In some cases, farmers complained that they were required to pay a portion of their operating, loans to the lending officers. In the southwest, where corporate farms dominate, and the largest concentrations of Hispanic farmers and ranchers live. the tactic was more direct - no loans. Many FSA employees are themselves farmers and have a personal interest in depriving loans to minority farmers. Finally, in 2000. the USDA's Office of Ethics was able to implement a provision that made it a conflict of interest for a FSA official to benefit personally from a loan in which he was involved.

25. For years, FSA has known that its system of county committees excluded minority

farmers. Many minority farmers complained that they never knew about FSA elections or when funds were available even after they inquired. This system of control by a few white farmers over federal farm dollars moving into the counties has been used to perpetuate and expand the farms of many county committee members and their families, at the expense of disfavored minority farmers. In some Alabama and Arkansas counties where minority farmers were a majority, they were nevertheless totally excluded from participation in the county committee system.

26. When farmers complained that civil rights investigations had been inadequate or that FSA had misrepresented the truth during. investigations, OCR sent investigators to review field offices for compliance. Discriminatory practices and treatment were uncovered in compliance reviews that investigations often did not identify. Through compliance reviews. it was uncovered that in certain offices in Oklahoma. FSA employees refused to register tribal land in their databases. This insured that the Native American farmers would not receive notice of elections to the county committee and would not be eligible to participate in FSA programs - simple and effective discrimination. That practice was discovered in August.1998, and I was still trying to insure that the all Native American farm land was registered in the database when I left office in 2001.

27. Results from many compliance reviews were shared with FSA administrator, the Deputy Secretary and the Assistant Secretary for

Administration. FSA's civil rights director, who now serves as the USDA's OCR Director of Civil Rights, would respond that training was provided to the FSA office in response to findings of non-compliance. When complaints continued. I met with the FSA administrator who referred me to the agency civil rights director. FSA was reluctant and sometimes field offices refused to implement settlement or compliance agreements. Progress was so slow that the FSA administrator was made personally responsible for implementing compliance and settlement agreements. Complaints reached such a level that the USDA Secretary had to become personally involved. One of the more infamous cases involved an employee in rural Virginia who had brandished a gun in the office at an African American farmer inquiring about a loan. The federal employee admitted having the weapon in the office. FSA concluded that it was an antique weapon that the employee had in the office for cleaning and gave the employee only a three day suspension.

28. After all the investigations and findings of discrimination, after all the findings that FSA was not in compliance with civil rights regulations. after the millions paid by FSA in settlement of administrative complaints and after the many more millions in debt that FSA has forgiven, there still has not been any change in the way programs are administered. There were many recommendations for change. Yet systemic exclusion of minority farmers remains the standard operating procedure for FSA.

29. If not every, many efforts were made to correct the situation. Congress allocated resources. The Clinton Administration made improving civil rights enforcement at the USDA a priority. Training was provided. Yet these and many other efforts did not provide lasting improvements. The 1,088 "backlogged" cases were reduced to seven. All of the resources within the program office and assistance from other agencies helped reduce the backlogged cases. In 1999 another 1.261 cases were filed. In FY2000, filings were down to 671. Most of the complaints continued to be filed against the FSA. Many of the new filings were more than a year old before the initial processing began. OCR staff was simply not prepared to do the work of the office.

30. The lack of quality in the processing of cases over this period of time produced many erroneous decisions. especially dismissals based on an alleged lack of jurisdiction. Hundreds of complaints were dismissed on the basis of "lack of jurisdiction" by people who did not know the basis of a jurisdictional claim under Title VI of the Civil Rights Act. Private contractors, as well as the Justice Department. provided training. Employees attended Civil Rights training outside the Department. Yet the training did not improve production or the quality of work.

31. As I reflect upon my tenure *as* OCR Director. I ask: What was accomplished? Thousands of cases were resolved through extraordinary methods. Many backlogged cases, with the exclusion of the complaints filed by African American farmers,

were resolved through an early resolution task force. Civil rights procedures were developed and published, but were not and are not followed. OCR dismissed hundreds of cases because they were not filed within 180 days of the "occurrence of the alleged discrimination." Yet many complainants did not receive a letter of acknowledgment after filing their complaint for more than a year and it frequently required another year for the complaint to be investigated and still another year before a proposed finding in the case was rendered. Consequently, there have been countless farmers who have lost their land or died waiting for USDA to process their complaints. Minority farmers continue to allege that FSA discriminate against them. The root of this problem lies in the unfettered discretion FSA employees have to control farmers' access to needed credit.

32. With few exceptions, minority participation in FSA programs is remarkably low. A comparative analysis of the distribution of the federal dollars would show this. I had suggested that a simple tracking of dollars would establish claims of exclusion by minority applicants. Small, minority farmers cannot compete with corporate farmers for loan eligibility, anymore than small business can compete with major corporations. USDA must propose. and Congress must approve, regulations with realistic eligibility standards for small farmers and set aside appropriate funding for this purpose. Exclusion of minority farmers from equitable participation in FSA program benefits

must end before there are no minority farmers left to complain.

I have reviewed the foregoing. Declaration and declare under penalty of perjury that it is true and correct to the best of my personal knowledge.

/s/ _____ Arpil 6, 2002
Rosalind D. Gray Date

AGRICULTURAL, RURAL DEVELOPMENT, FOOD AND DRUG ADMINISTRATION, AND RELATED AGENCIES APPROPRIATIONS ACT, 1999–CONFERENCE REPORT

The **PRESIDING OFFICER.** Under the previous order, the report will be stated.

The assistant legislative clerk read as follows:

The committee on conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 4101), have agreed to recommend and do recommend to their respective Houses this report, signed by a majority of the conferees.

The Senate proceeded to consider the conference report.

(The conference report is printed in the House proceedings of the RECORD of October 2, 1998).

Mr. COCHRAN. Madam President, pending before the Senate at this time is the conference report on the fiscal year 1999 Agriculture, Rural Development, Food and Drug Administration and Related Agencies Appropriations Act. We present this conference report for the Senate's approval this afternoon.

The agreement provides total new budget authority of $55.7 billion for programs and activities of the U.S. Department of Agriculture–except for the Forest Service, which is funded by the Interior

appropriations bill–the Food and Drug Administration, the Commodity Futures Trading Commission, and expenses and payments of the farm credit system. This is $6 billion more than the fiscal year 1998 enacted level; it is $1.9 billion less than the President's request level; it is $192 million less than the House-passed bill, and it is $1.1 billion less than the Senate-passed bill level.

The changes that were made in conference on mandatory funding requirements account for the overall increase from the fiscal year 1998 enacted level, principally reflecting a $2.6 billion lower estimate for Food Stamp Program funding requirements, higher Child Nutrition Program expenses, and a $7.6 billion increase in the payment to reimburse the Commodity Credit Corporation for net realized loss. The conference report also provides an additional $4.2 billion in emergency appropriations to assist agricultural producers and others who have suffered financial hardship due to adverse weather conditions and loss of markets.

Including congressional budget scorekeeping adjustments and prior base, 250 acres of soybeans, the conference report will provide a $4,230 payment to that farmer. The Democratic proposal, in removing the marketing loan caps, would provide increased income protection of $18,455 or a difference of $14,225 to the farmer with 390 acres of corn and 250 acres of soybeans in Iowa.

So again, that is a very substantial difference, and it is a difference that would carry through into next year because of the improved income safety net

aspect of the marketing assistance loan. The small AMTA supplement is a short term one-time payment.

So again, I just ask my colleagues from the Corn Belt whether 7 cents a bushel paid out now, but soon gone, is anywhere near enough to address severe farm income problems. Is 13 cents a bushel enough even to begin to address the economic devastation in wheat country: And I ask my colleagues whether a proposal with no direct support for soybeans is adequate to address the steep decline in soybean prices.

So that is really the question today. The question is whether or not those very small cash payments are going to be adequate for the tremendous farm income problems that are out there. I do not believe so. I do not believe that will help nearly enough–

The PRESIDING OFFICER. If the Senator will withhold, the hour of 5:30 having arrived, the clerk is to report the motion to invoke cloture on the motion to proceed to H.R. 10.

Mr. HARKIN. Mr. President, reserving the right to object, I ask for 1 additional minute tat the conclusion of the remarks of the Senator from Iowa before the rollcall vote on the motion to invoke cloture.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

Mr. HARKIN. Mr. President, again, this conference report needs to be rejected and sent back for further work to restore farm income protection by removing the marketing loan rate caps. There are also two other areas in which the conference report is not acceptable.

I would mention the labeling of beef and lamb for country of origin. The House Republicans rejected this idea. It is too bad, because under the WTO it is allowed, to have a country of origin labeling. It is not just for our beef and lamb producers in this country. I believe our consumers hate the right to know, when they buy a steak or chop or other cut of beef or lamb at the meat counter, what its country of origin is.

Second, we had mandatory price reporting in the Senate bill so livestock producers will have information to help them evaluate packer bids for fairness. The conference report converted that bill language into weak report language. We have had study after study after study on pricing practices in the livestock and meat business and the need for more openness and transparency. It is time we have real action, not another study on that.

For those reasons I believe the conference report ought to be rejected and sent back for further work. If it is not, then I am afraid we will have a one-time payment to farmers this fall and we will be back again here next year with fewer farmers and even more economic devastation in rural America.

Mr. President, I ask unanimous consent to have printed in the RECORD "Suggested Changes in Farm Policy for the 21st Century," submitted by Dr. Neil Harl of Iowa State University, and I yield the floor.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

SUGGESTED CHANGES IN FARM POLICY FOR THE 21ST CENTURY

FINE TUNING "FREEDOM TO FARM" (by Neil Harl)

Farmer-owned storage program for major commodities.

Long-term land idling (up to 20 years) in marginal areas (contracts terminate if prices rise above a specified level).

Standby authority to implement acreage set aside (if prices remain for a specified period below a designated level).

Adequate funding for FSA direct lending and loan guarantees for limited resource borrowers.

Continue LDP and marketing loans with slightly higher loan rate (not higher than cost of production on marginal lands).

The PRESIDING OFFICER. The Senator from Virginia, under a previous unanimous consent request is recognized for 1 minute.

Mr. ROBB. Mr. President, I rise to express my surprise and dismay about what occurred in the conference committee on the agriculture appropriations bill.

During debate on this bill in July, Mr. President, the Senate accepted an amendment I offered to waive the statute of limitations for discrimination complaints filed by many small and minority farmers against the U.S. Department of Agriculture. This amendment addressees an urgent and shameful problem, Mr. President, and we worked with farmers, the White House, the USDA, the Department of Justice, and the Congressional Black Caucus to develop language that would protect the legal rights of farmers and be implementable by USDA.

Mr. President, similar language was included in the House bill, but it was drafted more quickly and with less consensus. It was more narrowly defined and had less aggressive time limits for USDA to resolve discrimination complaints. And it cost $5 million less.

And even though Representative MAXINE WATERS, the chairman of the Congressional Black Caucus lobbied the conferees in support of the Senate version of this amendment, Mr. President, the Senate lost on almost all counts.

To give my colleagues some background, the investigative unit at USDA's Office of Civil Rights was abolished in 1983. Farmers whose complaints were pending at the time were led to believe their

complaints were still being investigated, when they were not. Farmers who filed complaints after the abolition of the unit were also lead to believe that their complaints would be processed and investigated, despite the fact that the USDA had no resources with which to conduct such investigations. The bottom line is that none of these complaints were ever considered–but none of the farmers were told that was the case.

When Secretary Glickman learned of this problem, Mr. President, he directed that the complaints be resolved quickly. In fact, I offered an amendment to last year's appropriations bill to fund the investigative unit.

But when USDA was finally prepared to enter into settlement agreements on some of these cases, Mr. President, the Department of Justice stepped in to claim that the statute of limitations for the complaints–despite USDA's deception in the matter–had expired. The amendment I offered to this year's appropriations bill eliminates this legal obstacle and allows farmers to pursue their claims of discrimination. It allows them to have their day in court, so to speak.

As we approached conference, however, I learned through staff that objections to accepting the Senate version of this amendment were raised based on cost. Our version was scored at $15 million, while the House version was scored at $10 million. Mr. President, there's no question the two amendments were slightly different. But the $15 million in the Senate amendment was to compensate Americans for

discrimination perpetuated by their own government. It was a figure determined by CBO, conferring with USDA, about which of the pending complaints would have likely resulted in legitimate and provable cases of government discrimination. It is money that our government owes to farmers who have been treated in such an unjust and morally reprehensible manner.

Mr. President, during conference deliberations, I learned that the House conferees objected to the scope of the Senate amendment. As I've alluded to before, the House version addressed only discrimination complaints against the Farm Service Agency. My amendment addressed complaints filed against not only the Farm Service Agency, but also the Rural Housing Service. We know that discrimination has occurred in both agencies, and study after study has clearly illustrated this. Unless we address complaints against both agencies, we allow justice to continue to elude a number of minority farmers in America who deserved at long last to be treated fairly.

To my dismay, Mr. President, the conferees accepted the House version of the civil rights amendment, adding only a small portion of the Senate version.

The Senate version of the civil rights amendment allowed for the waiver of the statute of limitations for discrimination complaints made against both the Farm Service Agency and the Rural Housing Service. The House version only allowed the FSA claims.

While the conference language allows farmers to file suit in federal court if their claims for relief are denied by USDA, the Senate language specified that the federal court shall apply a de novo standard of review. This standard would have allowed a federal court to review USDA's findings and rationales with a fresh eye, so to speak. In other words, a court would not be required to give as much deference to USDA's decisions. This is obviously a protection that would have given aggrieved farmers a degree of legal protection that is imminently justified. Yet no such protection exists in the conference language.

To make matters worse, Mr. President, the one protective provision that I was told would be included in the conference language—the expedited review provision—was somehow omitted from the conference report. When the conferees reached a compromise on this amendment, it is my understanding that they specifically agreed to include a provision of my amendment which limited USDA to 180 days in which to investigate complaints, issue findings, and propose settlement awards, where applicable. This provision was supposed to be included, but it was not.

Mr. President, I am at a loss to explain why we can't do a better job of rectifying such a grevious history of overt, admitted discrimination for so little money. Our Minority farmers deserved better conference language from this Congress than they got. It just underscores the enormous obstacle we face in resolving this issue—and that is that too few

members care enough about this problem to give it the attention and the priority it calls for.

Before I conclude, Mr. President, I'd like to share with my colleagues some updated news. Last week, the Office of Inspector General issued a report which lambasted the Office of Civil Rights' handling of the backlog of discrimination complaints. The report characterized the Office's case files as "too slovenly to ensure the availability of critical documents." It further berated the Office for its failure to implement the majority of recommendations made to the Department in a February 1997 report.

I am not sure why this Department has had so many problems, not only with eliminating unjust and inexcusable behavior, but also with efficiently resolving complaints of discrimination. These are symptoms of an overwhelming and inexcusable problem. As many of my colleagues know, this is a problem that I have been working to solve for almost two years, from the moment it was first brought to my attention by a group of minority farmers headed by a Virginian.

Mr. President, I have heard account after account of inexcusable behavior on the part of various officials at USDA, primarily those in positions of authority who process farmers' applications for loans. Some farmers have had trouble even getting loan applications, much less having their applications processed in a timely manner. Many farmers have cited stories in which their applications have been purposely processed

later than those of non-minority farmers. The loan money then, in effect, was dispersed to non-minority farmers first. Then, when many minority farmers checked the status of their applications, the USDA officials responded by stating that there wasn't any money left. Another farmer told me that a USDA official was permitted to keep a noose in his office, despite repeated complaints about the message it sent to minority farmers wishing to do business in that office.

I know that Secretary Glickman is committed to stemming this pattern, but ultimately Congress is responsible for overseeing our government agencies. In the two years that I've been working on this issue, talking with farmers, meeting with the Secretary and the President, we, as a Congress, have not taken a sufficiently forceful approach to stem this shameful pattern of discrimination. In my view, that makes us part of the problem as well.

When the conferees chose not to accept the Senate language, they made a choice that sends a disquieting message to minority farmers across this country. The message they sent was that they were willing to do the bare minimum for minority farmers who have suffered discrimination at the hands of government officials. It is a message that we, the Congress, are not willing to get fully invested in eliminating discrimination within our own government.

The President has indicated that he will veto this bill, and I am hopeful that my colleagues will take another opportunity to look at the differences

between the Senate language and the conference language. We will have another opportunity to correct a critical error in our priorities. The farmers deserve our best oversight efforts, and they deserve the strongest civil rights amendment that we can craft. I will continue to push all of our colleagues to do so. A lack of attention to this issue means not only failure on our part, but a perpetuation of a problem for which we should all be ashamed.

Thank you, Mr. President. I'd like to ask unanimous consent that this letter and executive summary from the Inspector General to the Secretary of Agriculture dated September 30, 1998 be included in the RECORD immediately following my remarks.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

U.S. DEPARTMENT OF AGRICULTURE,

OFFICE OF INSPECTOR GENERAL,

Washington, D.C. September 30, 1998.

REPORT TO THE SECRETARY ON CIVIL RIGHTS

ISSUES—PHASE V

From: Roger C. Vladero, Inspector General. Subject: Evaluation of the Office of Civil Rights' Efforts to Reduce the Backlog of Program Complaints, Evaluation Report No. 60801-1-Hq.

In July 1998, your Assistant Secretary for Administration asked the Office of Inspector General to review the efforts by the Office of Civil Rights (CR) to reduce the backlog of program complaints in USDA. Attached is a copy of the results of this review. This represents our fifth evaluation of the Department's efforts to reduce the program complaints backlog and to improve the overall complaint processing system, including the investigative process.

We found that the Department, through CR, has not made significant progress in reducing the complaints backlog. Whereas the backlog stood at 1,088 complaints on November 1, 1997, it still remains at 616 complaints as of September 11, 1998.

The problems we noted before in the complaints resolution process also continue. CR's data base remains an unreliable repository of information, and its casefiles are too slovenly to ensure the availability of critical documents. A disaffected staff and a leadership vacuum have contributed to a system that cannot ensure complainants a timely hearing of their grievances.

Of considerable concern to us is CR's lack of progress in reforming its operations in accordance with our previous recommendations. Few corrective actions have been taken to increase the efficiency of the complaints resolution process. We also noted that CR staff members have not always been honest in portraying the actual level of their performance. Some of the information they gave us proved to be

inaccurate. Some of the information they gave you on earlier occasions proved likewise to be inaccurate.

Because of continuing problems in the complaints resolution process, we are recommending that you convene a Complaints Resolution Task Force (independent of CR) to immediately assume control of the backlog and have full authority to resolve complaints, including entering into settlement agreements. We are also recommending that the civil rights function within the Department be elevated to the level of Assistant Secretary.

At your request, we will be continuing our work with CR, giving special emphasis to its management of settlement agreements.

EXECUTIVE SUMMARY

Purpose

The Assistant Secretary for Administration asked us to perform a followup review of the operations of USDA's Office of Civil Rights (CR), the office responsible for resolving complaints made against the Department for alleged civil rights violations in the administration of its programs. During four previous reviews of the Department's civil rights program complaints system, we determined that the system was not functioning properly and that the Department had amassed a growing backlog of complaints that required immediate attention. Although CR itself could not accurately determine how large the backlog was at the time of our first

review, it later identified 1,088 outstanding unresolved complaints before November 1, 1997.

Civil Action No. 00-2445(JR)

SECOND SUPPLEMENTAL DECLARATION OF ROSALIND D. GRAY

1. I am over 18 years of age and a United States Citizen.

2. My business address is 607 Oneida Place, N.W., Washington, D.C.

3. I am a 1973 graduate of Howard University School of Law, a member of the Mississippi Bar and have practiced in many federal district courts. I m also a member of the Bar of the United States Supreme Court. From 1976 to 1986, as trial counsel for and director of the Lawyers' Committee Municipal Services Equalization Project, I represented minorities in small, rural communities seeking to equalize municipal services. I have served as a consultant to the Legal Services Corporation, the office of Revenue Sharing and the Department of Justice and Housing and Urban Department. I have also served as Acting General Counsel to the U.S. Commission on Civil Rights and as Deputy General Counsel at the Equal Employment Opportunity Commission ("EEOC"). As EEOC Deputy General Counsel, I managed EEOC's national litigation programs and participated in the settlement of a number of major class actions. In addition, I have served as Associate General Counsel for the University of the District of Columbia ("UDC") where I represented UDC in federal litigation and administrative proceedings on employment

discrimination and other labor claims. From July 13, 1998 to January 20, 2001, I served as Director of the Office of Civil Rights ("OCR") for the United States Department of Agriculture ("USDA").

4. The OCR has broad responsibility for implementing and coordinating all USDA nondiscrimination, civil rights, and equal opportunity efforts in connection with all USDA programs and activities, including programs and activities which are operated or sponsored by USDA and carried out by non-federal organizations. During my tenure as the OCR Director, I was the principal advisor to the Secretary and the Assistant Secretary for Administration on all matters related to equal opportunity and civil rights. In 2003 the duties of the Assistant Secretary for Administration with respect to civil rights matters were transferred to the Assistant Secretary for Civil Rights. One of the principal duties of OCR was to investigate and process discrimination complaints of farmers and other producers with respect to the administration of USDA farm credit and non-credit benefit programs.

5. In my April 6, 2002 declaration, I described the problems that plagued OCR and stymied my best efforts to improve OCR's processing of discrimination complaints. These problems continue to plague OCR and are reportedly worse.

6. In my October 18, 2006 declaration, I affirmed, based upon my personal experience, that there can be no justification for OCR's inability to comply with the requirements of Departmental Regulation 4330-3 and that the fact that farmers

have not had their discrimination complaints acknowledged or investigated years after filing them indicates that the system is still dysfunctional.

7. During my tenure as OCR Director, I attempted to work with the USDA Office of General ("OGC") to formulate and implement the procedures promulgated at 7 C.F.R. Part 15f in response to the enactment of Pub. L. No. 105-277 § 741, codified at 7 U.S.C. § 2279 note. These efforts took place against the backdrop of the on-going *Pigford* litigation, the certification of a class in that litigation, and a struggle between OCG and OCR regarding how to carry out the remedial intent of the legislation. In terms of addressing fully the problems that gave rise to the special legislation extending the statute of limitations, the regulations were fatally flawed.

8. Previously I affirmed in my April 6, 2002 declaration that until 1997 the Farm Service Agency ("FSA") and its predecessor, Farmers Home Administration ("FmHA"), processed their civil rights complaints and that many complaints were destroyed, not accepted or not recorded at all even though FSA provided for a verbal complaint to be filed in person or through the telephone. Indeed, the Civil Rights Action Team ("CRAT"), appointed by Secretary Glickman in 1996 to investigate civil rights enforcement within USDA, noted that it "was unable to gather historical data on program discrimination complaints at USDA because record keeping on those matters has been virtually nonexistent." CRAT Report at 24. Despite this fact, OGC insisted that the regulations require a complainant to have a written discrimination

complaint on file with USDA in order to invoke the optional procedure described in 7 C.F.R. Part 15f, a limitation more narrow than the special remedial statute, more narrow than the definition of the class certified in the *Pigford* litigation and inconsistent with representations made by Secretary Glickman that oral complaints made during the recorded listening sessions conducted by the CRAT in January 1997 would be fully investigated.

9. In determining who would be eligible to receive notification letters prescribed by 7 C.F.R. § 15f.5, all members of the *Pigford* class as defined were eliminated. As a result of these efforts to limit eligibility, only 194 notification letters were sent pursuant to 7 C.F.R. § 15f.5 and of that number only 111 involved FSA programs. Characteristic of the apparent indifference of USDA to civil rights enforcement was the complete lack of response from FSA to OCR's request that FSA review its databases and records to determine whether additional eligible complaints were still lodged with the local FSA offices. In addition, the regulation placed the burden upon those complainants who had not received a notification letter to contact OCR in order to find out how to participate in the statute of limitation process. However, information about the program was not disseminated in a way reasonably calculated to provide notice to all minority farmers covered by the special legislation. To the best of my recollection, the outreach effort consisted of contacting the 1890 historically black agricultural schools, black farmer organizations and state FSA offices, which was particularly ironic inasmuch as black farmers who fit

within the *Pigford* class definition were deemed to be ineligible to receive the § 741 notification letter. I do not recall and am not aware of any efforts to inform Hispanic or women farmers or any organizations representing such farmers of the optional § 741 procedure.

10. For the few farmers that opted for the § 741 administrative procedure, their complaints and the staff initially designated to process them were soon merged into the processing of existing and new complaints that poured into OCR. As I affirmed in my April 6, 2002 declaration, after substantially reducing the backlogged cases that I encountered when I assumed the position of OCR Director, OCR received 1261 new cases filed in 1999 and another 671 in fiscal year 2000 and many of the filings were more than a year old before the initial processing began. Ultimately, OCR staff was simply not prepared to do the work of the office. In the final analysis, as I also affirmed in my April 6, 2002 declaration, "[c]ivil rights procedures were developed and published, but were not and are not followed," and despite any best efforts to make the system work properly, the complaint processing system collapsed and complaints, whether submitted pursuant to the optional § 741 procedure or otherwise, were caught up in the dysfunction that characterized OCR.

I have reviewed the foregoing Declaration and declare under penalty of perjury that it is true and correct to the best of my personal knowledge.

/s/ _____ 09/12/2007

Rosalind D. Gray Date

Supplemental Declaration of Rigoberto Banuelos

I, Rigoberto Banuelos, hereby state and declare the following:

1. I am over 18 years of age, Hispanic, and a United Stats Citizen. My date of birth is December 22, 1948. My mailing address is 6412 S. Walnut Ave. Fresno, California 93706.

2. I have been farming for approximately the past 17 years. Today I currently grow grapes to make raisins.

3. In approximately 1997 extremely hot weather destroyed much of my grape crop. The Fresno Farm Service Agency ("FSA") of the United States Department of Agriculture announced that non-credit disaster relief payments would be available for farmers whose crops were destroyed by the disaster.

4. I applied at the FSA to receive non-credit disaster relief payments. While I was qualified to receive $17,000, the FSA was only willing to give me half of what I was qualified to receive.

5. I observed that other similarly-situated Anglo farmers received the total amounts that they were qualified to receive. I complained to the FSA about being discriminated against because of my Hispanic ethnicity.

6. To this day, the Office of Civil Rights has not investigated my complaint.

I have reviewed the foregoing declaration, consisting of six (6) numbered paragraphs, and declare, under penalty of perjury that it is true and correct to the best of my personal knowledge.

/s/ _____ 3/25/02 _____
Rigoberto Banuelos Date

Supplemental Declaration of José and Flora Chaidez

We, José Chaidez and Flora Chaidez, hereby state and declare the following:

1. We are both over 18 years of age. José Chaidez's date of birth is February 15, 1942. Flora Chaidez's date of birth is October 26, 1951. We are each permanent residents of the United States. Our mailing address is 6326 North Sheridan Road, Clovis, CA 93619.

2. We both grew up on farms. We have been farming all of our lives. We began farming together in 1977. We grew tomatoes, onions, green beans, gykon, eggplants, grapes and squash. Our farm is 6 acres and was last used in October 2001.

3. We first attempted to apply for non-credit disaster relief from the Farmers Home Administration "FmHA" of the United States Department of Agriculture ("USDA") in 1991. That year we were farming 20 acres of grapes and a severe drought destroyed 100% of or harvest. The FmHA denied our application for non-credit disaster relief.

4. In 2000, we lost al of our crops due to heavy rains that caused severe flooding. We applied and were denied non-credit disaster relief assistance.

5. We believe that the FmHA/FSA discriminated against us because we are Hispanic.

6. After FmHA/FSA denied our non-credit benefit relief applications, we complained to the FmHA/FSA about being discriminated against. To this day, the Office of Civil rights has taken no action to resolve our complaints.

We have reviewed the foregoing Declaration, consisting of six (6) numbered paragraphs, and declare under penalty that it is true and correct to the best of our personal knowledge.

/s/ 11/07/03
José Chaidez Date

/s/ 11/07/03
Flora Chaidez Date

Supplemental Declaration of Larry Chavarria and Robert Chavarria

We, Larry Chavarria and Robert Chavarria, hereby state and declare the following:

1. We are both over 18 years of age, United States citizens and Hispanic farmers. Larry Chavarria's date of birth is August 9, 1954. Robert Chavarria's date of birth is November 12, 1951. Our mailing address is 36 Canterbury Drive Lemoore, California 93245.

2. Our family began cultivating our 640 acre farm in 1944. We farmed together as a general partnership, Chavarria Farming Co., from 1987 until 2000. We grew wheat, cotton, cantaloupes and milo.

3. In 1999 the King County Farm Service Agency ("FSA") of the United States Department of Agriculture's ("USDA") froze our Product Flexibility Contract ("PFC") payment/Agricultural Market Transition Act ("AMTA") payment.

4. We believe that the FSA withheld these non-credit benefit payments because we are of Hispanic ethnicity and for years the FSA has engaged in the practice of discriminating against local Hispanic farmers.

5. After the FSA office notified us of its decision to withhold these benefits for which we were previously qualified, we both complained to

the FSA employees about this discriminatory treatment and submitted a written discrimination complaint to the USDA Office of Civil Rights ("OCR") in Washington, DC.

6. To date the OCR has taken no action to resolve or even investigate our discrimination complaint.

7. As a result of FSA's continual discriminatory treatment towards us, sadly, we had to eventually quit farming. We were forced to sell our farm that had been in our family for over fifty years.

8. If fairly treated by USDA, we would promptly return to farming as there is local farm land in the area readily available for leasing. In light of the current thriving almond market, we anxiously await this promising opportunity to return to farming and plant almond trees.

We have reviewed the foregoing Declaration, consisting of eight (8) numbered paragraphs, and declare, under penalty of perjury that it is true and correct to the best of our personal knowledge.

/s/ 3/25/02
Larry Chavarria Date

/s/ 3/25/02
Robert Chavarria Date

Declaration of Rogerio Ramirez

I, Rogerio Ramirez, hereby state and declare the following:

1. I am over 18 years of age, Hispanic, and a citizen of the United States of America. My date of birth is October 21, 1953. My mailing address is P.O. Box 493, Alpaugh, California 93201.

2. I am a fifth-generation farmer who has dedicated approximately forty years of my life to farming. My grandparents first taught me the art of farming when I resided in Mexico as a young child. I have extensive experience raising cattle, turkey, chickens, ostriches, ducks, rabbits, etc. I also have grown the following crops: alfalfa, tomatoes, tomatillos, asparagus, grapes and oats. Currently I have approximately 78 acres of land on which I can only afford to farm 5 acres of grapes.

3. During December 1996, severe rain storms caused severe flooding which destroyed my trailer home, and killed all of approximately 300 of my farm animals and 100% of my 20 acres of oats, asparagus, and tomatillo crops.

4. The government again announced that President Clinton had declared the floods to be a natural disaster and that funding would be available for all farmers whose crops were harmed by the flooding.

5. When I initially visited the Tulare County Farm Service Agency ("FSA") of the United States Department of Agriculture ("USDA") office in early 1997, the FSA employee informed me that the FSA office was willing to provide me with assistance. The FSA loan officer that assisted me, Gloria Mejia, recommended that I first apply for non-credit crop disaster assistance to cover the animals and crops that were destroyed.

6. FSA eventually denied my non-credit crop disaster benefits application. To this day I am not aware of any legitimate reason why FSA denied my non-credit crop disaster benefit and granted it to the Anglo farmers.

7. As a result of these December 1995 storms, many Hispanic farmers completed and submitted the arduous non-credit crop disaster benefit applications. I am not aware of a single Hispanic farmer whose application was approved. However, I know of numerous Anglo farmers who received non-credit farm benefits through merely applying for the program by telephone.

8. I am convinced that FSA treated me in an unfair manner because I am of Hispanic heritage. I complained about the discriminatory treatment to several FSA officials. I also wrote a written letter of complaint to Governor Gray Davis in February 1999.

9. The Office of Civil Rights has not investigated my complaint.

I have reviewed the foregoing Declaration, consisting of nine (9) numbered paragraphs, and declare, under penalty that it is true and correct to the best of my personal knowledge.

/s/ _____ 6/26/04 _____
Rogerio Ramirez Date

Declaration of Roel Vasquez

I, Roel Vasquez, hereby state and declare the following:

1. I am over 18 years of age, Hispanic, and a citizen of the United States of America. My date of birth is January 1, 1969. My mailing address is 29355 Vasquez Road, San Benito, TX 78586.

2. I am a second-generation farmer with approximately 25 years of farming experience. I have farmed independently for the past 15 years. Over the years I have grown corn, milo, and cotton and have raised cattle.

3. Based on my personal experience, I believe that it is common practice for the Cameron County Farm Service Agency ("FSA") to discriminate against Hispanic farmers.

4. In 1997 the Cameron County FSA denied my non-credit farm subsidy payment, alleging that my landlord signed his required signature on the application in an untimely manner. FSA's allegations were untrue.

5. I believe the FSA's denial was a form of discrimination. I appealed the FSA's decision to the County Committee. The County Committee also refused to approve my non-credit farm subsidy payment.

6. I was infuriated and I complained directly to the FSA about their discriminatory treatment towards me in their refusal to grant me the non-credit farm subsidy payment that I deserved.

7. In response to this complaint, to this day the USDA Office of Civil Rights has taken no action.

I have reviewed the foregoing Declaration, consisting of seven (7) numbered paragraphs, and declare, under penalty of perjury, that it is true and correct to the best of my personal knowledge.

/s/ 8/15/04

Roel Vasquez Date

Amended Declaration of Olga and John Carrillo

We, John and Olga Carrillo, hereby state and declare the following:

1. We are each over 18 years of age, United States citizens and Hispanic. Olga Carrillo's date of birth is October 30, 1930; her address is 253 6th Street Soledad, California 93960. Her son John Carrillo's date of birth is November 12, 1951; his address is 1441 Monterey Street Soledad, California 93960. While John Carrillo currently performs all of the farming duties, all of their United States Department of Agriculture ("USDA") loans are in Olga Carrillo's name.

2. John Carrillo began farming in 1979 with his two brothers and father as "Carrillo Farms." He gained his skills as a farmer through hands on experience. We cultivate chili, tomatillos, lettuce, and broccoli.

3. In 1997 we applied for a Non-credit Crop Disaster Assistance Program after harsh weather had caused severe damage to our tomatillo crop. While other similarly-situated Anglo farmers qualified and received payments, the USDA Salinas Farm Service Agency ("FSA") refused to provide us with any non-credit crop disaster payments.

4. We believe that we were qualified to receive non-credit farm disaster payments and that

the FSA discriminated against us in because we were Hispanic farmers.

5. After we were notified that the FSA had denied our non-credit crop disaster application, we complained to the FSA employees and relayed to them our belief that their denial was discrimination related.

6. To date the Office of Civil Rights ("OCR") has still not investigated our complaint.

7. In 2003 the FSA refused to release any of our property that secured our FSA loan which had been severely over collateralized. We submitted a written discrimination complaint to the OCR on December 26, 2003 concerning this matter.

8. On September 18, 2006 we finally received acknowledgement that the OCR had received our complaint that we had filed almost three years ago. The letter stated that the complaint would be investigated sometime in the future.

9. The OCR has yet to investigate this complaint. After taking almost three years to acknowledge receiving our discrimination complaint, it seems rather doubtful that the OCR will actually venture to investigate this matter in the near future.

We have received the foregoing Declaration, consisting of nine (9) numbered paragraphs, and

declare under penalty of perjury that the above is true and accurate to the best of our personal knowledge.

/s/ _____ 7/11/02 _____
John Carrillo Date

/s/ _____ 7/11/02 _____
Olga Carrillo Date

SEC. 14011. SENSE OF CONGRESS RELATING TO CLAIMS BROUGHT BY SOCIALLY DISADVANTAGED FARMERS OR RANCHERS.

It is the sense of Congress that all pending claims and class actions brought against the Department of Agriculture by socially disadvantaged farmers or ranchers (as defined in section 355(e) of the Consolidated Farm and Rural Development Act (7 U.S.C. 2003(e)), including Native American, Hispanic, and female farmers or ranchers, based on racial, ethnic, or gender discrimination in farm program participation should be resolved in an expeditious and just manner.

SEC. 14012. DETERMINATION ON MERITS OF PIGFORD CLAIMS.

(a) Definitions.--In this section:

(1) Consent decree.--The term ``consent decree'' means the consent decree in the case of *Pigford v. Glickman*, approved by the United States District Court for the District of Columbia on April 14, 1999.

(2) Department.--The term ``Department'' means the Department of Agriculture.

(3) Pigford claim.--The term ``Pigford claim'' means a discrimination complaint, as defined by section 1(h) of the consent decree and documented under section 5(b) of the consent decree.

(4) Pigford claimant.--The term "Pigford claimant" means an individual who previously submitted a

late-filing request under section 5(g) of the consent decree.

(b) Determination on Merits.--Any Pigford claimant who has not previously obtained a determination on the merits of a Pigford claim may, in a civil action brought in the United States District Court for the District of Columbia, obtain that determination.

(c) Limitation.--

(1) In general.--Subject to paragraph (2), all payments or debt relief (including any limitation on foreclosure under subsection (h)) shall be made exclusively from funds made available under subsection (i).

(2) Maximum amount.--The total amount of payments and debt relief pursuant to actions commenced under subsection (b) shall not exceed $100,000,000.

(d) Intent of Congress as to Remedial Nature of Section.--It is the intent of Congress that this section be liberally construed so as to effectuate its remedial purpose of giving a full determination on the merits for each Pigford claim previously denied that determination.

(e) Loan Data.--

(1) Report to person submitting petition.--

(A) In general.--Not later than 120 days after the Secretary receives notice of a complaint filed by a claimant under subsection (b), the Secretary shall

provide to the claimant a report on farm credit loans and noncredit benefits, as appropriate, made within the claimant's county (or if no documents are found, within an adjacent county as determined by the claimant), by the Department during the period beginning on January 1 of the year preceding the period covered by the complaint and ending on December 31 of the year following the period.

(B) Requirements.--A report under subparagraph (A) shall contain information on all persons whose application for a loan or benefit was accepted, including--

(i) the race of the applicant;

(ii) the date of application;

(iii) the date of the loan or benefit decision, as appropriate;

(iv) the location of the office making the loan or benefit decision, as appropriate;

(v) all data relevant to the decisionmaking process for the loan or benefit, as appropriate; and

(vi) all data relevant to the servicing of the loan or benefit, as appropriate.

(2) No personally identifiable information.--The reports provided pursuant to paragraph (1) shall not contain any information that would identify any person who applied for a loan from the Department.

(3) Reporting deadline.--

(A) In general.--The Secretary shall--

(i) provide to claimants the reports required under paragraph (1) as quickly as practicable after the Secretary receives notice of a complaint filed by a claimant under subsection (b); and

(ii) devote such resources of the Department as are necessary to make providing the reports expeditiously a high priority of the Department.

(B) Extension.--A court may extend the deadline for providing the report required in a particular case under paragraph (1) if the Secretary establishes that meeting the deadline is not feasible and demonstrates a continuing effort and commitment to provide the required report expeditiously.

(f) Expedited Resolutions Authorized.--

(1) In general.--Any person filing a complaint under this section for discrimination in the application for, or making or servicing of, a farm loan, at the discretion of the person, may seek liquidated damages of $50,000, discharge of the debt that was incurred under, or affected by, the 1 or more programs that were the subject of the 1 or more discrimination claims that are the subject of the person's complaint, and a tax payment in the amount equal to 25 percent of the liquidated damages and loan principal discharged, in which case--

(A) if only such damages, debt discharge, and tax payment are sought, the complainant shall be able to prove the case of the complainant by substantial

evidence (as defined in section 1(l) of the consent decree); and

(B) the court shall decide the case based on a review of documents submitted by the complainant and defendant relevant to the issues of liability and damages.

(2) Noncredit claims.--

(A) Standard.--In any case in which a claimant asserts a noncredit claim under a benefit program of the Department, the court shall determine the merits of the claim in accordance with section 9(b)(i) of the consent decree.

(B) Relief.--A claimant who prevails on a claim of discrimination involving a noncredit benefit program of the Department shall be entitled to a payment by the Department in a total amount of $3,000, without regard to the number of such claims on which the claimant prevails.

(g) Actual Damages.--A claimant who files a claim under this section for discrimination under subsection (b) but not under subsection (f) and who prevails on the claim shall be entitled to actual damages sustained by the claimant.

(h) Limitation on Foreclosures.--Notwithstanding any other provision of law, during the pendency of a Pigford claim, the Secretary may not begin acceleration on or foreclosure of a loan if--

(1) the borrower is a Pigford claimant; and

(2) makes a prima facie case in an appropriate administrative proceeding that the acceleration or foreclosure is related to a Pigford claim.

(i) Funding.--

(1) In general.--Of the funds of the Commodity Credit Corporation, the Secretary shall make available for payments and debt relief in satisfaction of claims against the United States under subsection (b) and for any actions under subsection (g) $100,000,000 for fiscal year 2008, to remain available until expended.

(2) Authorization of appropriations.--In addition to funds made available under paragraph (1), there are authorized to be appropriated such sums as are necessary to carry out this section.

(j) Reporting Requirements.--

(1) In general.--Not later than 180 days after the date of the enactment of this Act and every 180 days thereafter until the funds made available under subsection (i) are depleted, the Secretary shall submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate a report that describes the status of available funds under subsection (i) and the number of pending claims under subsection (f).

(2) Depletion of funds report.--In addition to the reports required under paragraph (1), the Secretary shall submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate a report that notifies the

Committees when 75 percent of the funds made available under subsection (i)(1) have been depleted.

(k) Termination of Authority.--The authority to file a claim under this section terminates 2 years after the date of the enactment of this Act.

Amended Declaration of Miguel Espindola

I, Miguel A. Espindola, hereby state and declare the following:

1. I am over 18 years of age, Hispanic, and a permanent resident of the United States. My date of birth is November 15, 1966. My mailing address is 362 Manor Avenue, Watsonville, CA 95076.

2. I am a fourth generation farmer and initially learned the art of farming as a child working on a farm in Mexico where we grow corn and beans. I have been farming full-time for the past 15 years. Today I currently lease 10 acres of land where I grow raspberries and green beans.

3. In February 2001, I applied for non-credit disaster relief assistance for my raspberry crop damage that was caused by heavy rains and then multiple heat waves. Approximately 75-80% of my raspberry crop was destroyed that was valued at approximately $45,000.

4. The FSA sent me a letter informing me that I failed to qualify because of the strawberry boycott. This reason was preposterous because I was not involved in producing strawberries.

5. I complained to the FSA, about being discriminated against because of my Hispanic ethnicity. To this day, my complaint remains unresolved.

6. In 2003, I visited the Salinas FSA office to apply for disaster relief assistance from the heavy rains and heat waves that destroyed 75% of my crop. FSA refused to provide me with any type of non-credit disaster relief assistance.

7. I immediately filed a written discrimination complaint with the USDA Office of Civil Rights. To date the Office of Civil Rights has taken no action.

I have reviewed the foregoing declaration, consisting of seven (7) numbered paragraphs, and declare, under penalty of perjury that it is true and correct to the best of my personal knowledge.

/s/ 10/18/06

Miguel A. Espindola Date

Supplemental Declaration of Juan Raya

I, Juan Raya, hereby state and declare the following:

1. I am over 18 years of age, Hispanic, and a U.S. citizen. My date of birth is May 5, 1967. My mailing address is 2702 North Griffen Road, Prosser, Washington 99350.

2. I am a fourth-generation farmer who has devoted my entire life to farming and ranching. I was raised on a farm and initially learned how to farm as a young boy from my father and then continued to perfect my skills through years of hands-on experience. The majority of my early years I dedicated to farming. I have spent the past 10 years ranching. For the past 5 years I have ranched independently.

3. In addition to raisins, goats and cattle, I have experience performing various types of farm-related skills such as preparing the land, fertilizing, planting, harvesting, watering, and applying pesticides. In the past I have also grown cherries, applies, and an assortment of legumes.

4. In January 2005 I submitted a written declaration complaint to the United States Department of Agriculture's

("USDA") Office of Civil Rights ("OCR"). The impetus for any complaint was the discriminatory treatment I had experienced by Crispin Garza, of the Franklin County Farm Service Agency ("FSA") when I applied for an operating loan.

5. To date, the OCR has not even acknowledged receiving any complaint, yet alone began investigating its accusations. Frankly, the OCR has not done a thing.

I have reviewed the foregoing declaration, consisting of five (5) numbered paragraphs, and declare, under penalty of perjury that it is true and correct to the best of my personal knowledge.

/s/ _____ 10/24/06 _____
Juan Raya Date

Declaration of Rudy Longoria

I, Rudy Longoria, hereby state and declare the following:

1. I am over 18 years of age, Hispanic and a U.S. citizen. My date of birth is January 24, 1954. My mailing address is 1006 E. Pecos Street, Pearsall, Texas 78061.

2. I have over 20 years of farming experience. I grew up on a farm family where I learned farming from my father. I once farmed over 200 acres.

3. During several different years in the 1980s & 1990s, harsh weather conditions destroyed much of my crop. On these occasions, I applied for non-credit crop disaster relief benefits at the Frio County office of the Farmers Home Administration ("FmHA") of the United States Department of Agriculture ("USDA").

4. Without fail the FmHA always denied my non-credit crop disaster benefits application.

5. I observed that the FmHA gave various other local Anglo farmers their non-credit disaster crop payments, while the FmHA seemed to deny all of the Hispanic farmers' non-credit payment applications. I believe that the FmHA discriminated against me because I am an Hispanic farmer.

6. Each year that the FmHA denied my non-credit crop disaster payment, I complained to

the FmHA officials about its employees discriminatory treatment towards me in their decision to withhold my non-credit disaster relief payments.

7. To this day the USDA Office of Civil Rights has taken no action to investigate any of my civil rights complaints.

I have reviewed the foregoing Declaration, consisting of seven (7) numbered paragraphs, and declare under penalty of perjury that it is true and correct, to the best of my personal knowledge.

/s/ 10/25/06

Rudy Longoria Date

Supplemental Declaration of Gloria Orduno Morales

I, Gloria Orduno Morales, hereby state and declare the following:

1. I am over 18 years of age, a U.S. citizen and a Hispanic farmer. My date of birth is August 8, 1948. My mailing address is 153 North Effie, Fresno, CA 93721.

2. In 1993 a disaster occurred in Fresno County which resulted in me losing approximately 70% of my grape crop to a disease called phomophis. In September of 1993 I visited the Fresno County Farmers Home Administration ("FmHA") of the United States Department of Agriculture ("USDA") and applied for non-credit crop disaster relief benefits.

3. After no receiving any notification from the FmHA regarding the status of my non-credit crop disaster application, I returned to the FmHA in December of 1993 to see how soon I would be receiving my payment. The FmHA office instructed me that they were unable to locate my application and recommended that I complete and submit a second application.

4. I followed FmHA's exact instruction only to later be accused by FmHA of attempting to fraudulently file two benefit applications. The FmHA eventually denied my non-credit crop disaster benefit application. I felt that FSA discriminated against me because I am a Hispanic farmer. I filed a

written discrimination complaint with the USDA's Office of Civil Rights ("OCR").

5. To this day the OCR has failed to investigate my complaint.

6. After enduring over twenty years of FSA's continual discriminatory treatment towards me, I had no other option but to quit farming. However, in the event that USDA would not discriminate against me in the future, I would gladly return to farming. I am aware of local farm land that I could lease and begin planting.

I have reviewer the foregoing Declaration, consisting of six (6) numbered paragraphs and declare under penalty of perjury that the above is true and accurate to the best of my personal knowledge.

/s/ _____ 10/19/06
Gloria Orduno Morales Date

Declaration of Rogerio Ramirez

I, Rogerio Ramirez, hereby state and declare the following:

1. I am over 18 years of age, Hispanic, and a citizen of the United States of America. My date of birth is October 21, 1953. My mailing address is P.O. Box 493, Alpaugh, California 93201.

2. I am a fifth-generation farmer who has dedicated approximately forty years of my life to farming. My grandparents first taught me the art of farming when I resided in Mexico as a young child. I have extensive experience raising cattle, turkey, chickens, ostriches, ducks, rabbits etc. I also have grown the following crops: alfalfa, tomatoes, tomatillos, asparagus, grapes and oats. Currently I have approximately 78 acres of land on which I can only afford to farm 5 acres of grapes.

3. During December of 1996, severe rains storms caused severe flooding which destroyed my trailer home, and killed all of approximately 300 of my farm animals and 100% of my 20 acres of oats, asparagus, and tomatillo crops.

4. The government again announced that President Clinton had declared the floods to be a natural disaster and that funding would be available for all farmers whose crops where harmed by the flooding.

5. When I initially visited the Tulare County Farm Service Agency ("FSA") of the United

States Department of Agriculture ("USDA") office in early 1997, the FSA employee informed me that the FSA office was willing to provide me with assistance. The FSA loan officer that assisted me, Gloria Mejla, recommended that I first apply for non-credit crop disaster assistance to cover the animals and crops that were destroyed.

6. FSA eventually denied my non-credit crop disaster benefits application. To this day I am not aware of any legitimate reason why FSA denied my non-credit crop disaster benefit and granted it to the Anglo farmers.

7. As a result of these December 1996 storms, many Hispanic farmers completed and submitted the arduous non-credit crop disaster benefit applications. I am not aware of a single Hispanic farmer whose application was approved. However I know of numerous Anglo farmers who received non-credit farm benefits through merely applying for the program by telephone.

8. I am convinced that FSA treated me in an unfair manner because I am of Hispanic heritage. I complained about the discriminatory treatment to several FSA officials. I also wrote a written letter of complaint to Governor Gray Davis in February 1999.

9. The Office of Civil Rights has not investigated my complaint.

I have reviewed the foregoing Declaration, consisting of nine (9) numbered paragraphs, and declare, under

penalty of perjury that it is true and correct to the best of my personal knowledge.

/s/ _____ 10/25/06 _____

Rogerio Ramirez Date

Supreme Court, U.S.
FILED
DEC 18 2009

No. 09-333

In the Supreme Court of the United States

GUADALUPE L. GARCIA, ET AL., PETITIONERS

v.

THOMAS J. VILSACK, SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether 5 U.S.C. 704 precludes petitioners' claims under the Administrative Procedure Act alleging that the United States Department of Agriculture (USDA) systematically failed to investigate administrative complaints of discrimination in lending programs because Congress specifically prescribed an "adequate remedy" for this injury by retroactively extending the limitations period for filing certain types of discrimination claims against USDA.

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In the Supreme Court of the United States

No. 09-333

GUADALUPE L. GARCIA, ET AL., PETITIONERS

v.

THOMAS J. VILSACK, SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) in these consolidated cases is reported at 563 F.3d 519. The interlocutory order of the district court in *Love* v. *Connor* (Pet. App. 25a-37a) is reported at 525 F. Supp. 2d 155. The interlocutory order of the district court in *Garcia* v. *Veneman* (Pet. App. 38a-39a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 2009. A petition for rehearing was denied on June 18, 2009 (Pet. App. 23a-24a). The petition for a writ of certiorari was filed on September 15, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners, Hispanic and female farmers, filed suits alleging that, since 1981, the United States Department of Agriculture (USDA) discriminated against them in the administration of its farm benefit programs and failed to act on their discrimination complaints as required by USDA regulations, in violation of the Equal Credit Opportunity Act (ECOA), 15 U.S.C. 1691 *et seq.*, and the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* Pet. App. 5a. Petitioners sought to pursue their claims as a class action, but the district court denied class certification based on lack of commonality and dismissed petitioners' failure-to-investigate claims brought under ECOA. *Id.* at 40a-67a, 68a-92a. The United States Court of Appeals for the District of Columbia Circuit affirmed in prior appeals. *Id.* at 40a-67a, 68a-92a.

On remand, the district court considered petitioners' failure-to-investigate claims under the APA. Pet. App. 5a, 28a. The district court dismissed those claims, holding that the APA does not permit direct judicial review here because Congress provided to petitioners an adequate alternative remedy by retroactively extending the statute of limitations period to allow certain types of discrimination complaints to proceed against USDA. *Id.* at 31a-36a. Petitioners filed an interlocutory appeal pursuant to 28 U.S.C. 1292(b), and the court of appeals affirmed the district court's dismissal of the failure-to-investigate APA claims. Pet. App. 9a-19a.

1. USDA administers a variety of credit and benefit programs through the Farm Service Agency (FSA). See Consolidated Farm and Rural Development Act, 7 U.S.C. 1921 *et seq.*; 7 C.F.R. 2.42(28); Pet. App. 44a, 73a. Like its predecessor the Farmers Home Adminis-

tration (FmHA), the FSA is authorized to make and guarantee loans to farmers who cannot obtain credit from commercial institutions. *Id.* at 44a-45a, 73a-74a. At the times relevant to this case, applications for loan programs were submitted to, and processed by, the FmHA's and the FSA's county offices, which determined whether an applicant was eligible for a loan. *Ibid.*; see also 7 C.F.R. 1910.3-1910.4 (1997).

Since 1966, USDA has had regulations prohibiting discrimination on various bases (including sex, race, and national origin) in the administration of any of its programs and activities. See 7 C.F.R. Pt. 15d; 31 Fed. Reg. 8175 (1966) (promulgating 7 C.F.R. 15.52 (1967), the predecessor to 7 C.F.R. 15d.4). The regulations permit a farmer who believes he or she has been discriminated against to file a complaint with either the USDA Secretary or the USDA Office of Civil Rights. Pet. App. 45a, 74a. Although the USDA component charged with investigating discrimination complaints has varied somewhat over the years, see, *e.g.*, 31 Fed. Reg. 8,175 (1966) (Office of the Inspector General); 50 Fed. Reg. 25,687 (1985); 54 Fed. Reg. 31,163, 31,164 (1989) (Office of Advocacy and Enterprise); 64 Fed. Reg. 66,709, 66,710 (1999) (Office of Civil Rights), the relevant component has always been authorized to take necessary corrective action if it concludes that a discrimination complaint has merit, 7 C.F.R. 15d.4; 7 C.F.R. 15.52(b) (1997).

In addition to USDA's administrative avenues for processing and investigating complaints of discrimination, aggrieved parties may seek relief in federal district court under ECOA, which makes it "unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction * * * on the basis of race, color, religion, national origin, sex or mari-

tal status, or age." 15 U.S.C. 1691(a)(1). ECOA authorizes successful plaintiffs to recover damages from creditors—including the federal government, see *Moore* v. *USDA*, 55 F.3d 991, 994 (5th Cir. 1995) (holding that ECOA waives sovereign immunity of United States)—as well as costs and attorneys fees. 15 U.S.C. 1691e(a) and (d). ECOA plaintiffs are not required to exhaust administrative remedies prior to filing suit. Pet. App. 75a; see 63 Fed. Reg. 62,962, 62,963 (1998). However, ECOA includes a two-year statute of limitations. 15 U.S.C. 1691e(f).

In the mid-1990s, USDA commissioned several studies and investigations in response to allegations that it had engaged in race, gender, and national origin discrimination. One such investigation, conducted by USDA's Civil Rights Action Team, produced a report (the CRAT Report) finding that USDA had, over the course of a number of years, accumulated a significant backlog of discrimination complaints that needed prompt action. See *Pigford* v. *Glickman*, 206 F.3d 1212, 1214-1215 (D.C. Cir. 2000).

Congress responded to the CRAT Report by enacting, on October 21, 1998, a special remedial statute governing non-employment-related complaints that had been filed with USDA before July 1, 1997, and that alleged that discrimination had occurred between January 1, 1981, and December 31, 1996. Pet. App. 6a-7a; *id.* at 177a-179a; Act of Oct. 21, 1998, Pub. L. No. 105-277, § 741, 112 Stat. 2681-30 to 2681-31 (Section 741) (codified at 7 U.S.C. 2279 note). Section 741 extended the statute of limitations for filing such claims of discrimination to two years from its enactment (*i.e.*, to October 21, 2000). Pet. App. 177a. Congress's purpose in enacting Section 741 was to provide a remedy for individuals who

claimed to have been victims of discrimination in the 1980s and early 1990s because Congress found that USDA's processes for reviewing civil rights complaints "did not function effectively" during much of the those decades. 63 Fed. Reg. 67,392 (1998); see also 144 Cong. Rec. 23,276-23,277 (1998) (statement of Sen. Robb).

The practical effect of Section 741 was to resurrect a number of discrimination claims against USDA that would otherwise have been time-barred. Congress achieved that goal by providing two distinct and alternative avenues by which claimants could seek relief. First, Section 741(a) extended until October 21, 2000, the time in which an individual with an eligible claim could file suit in federal district court under ECOA. Section 741(a), 112 Stat. 2681-30; Pet. App. 7a. Second, Section 741(b) created a new administrative remedy that allowed individuals to "seek a determination on the merits of the[ir] eligible complaint" by USDA "in lieu of filing a civil action," provided they sought such relief by October 21, 2000. Section 741(b), 112 Stat. 2681-30 to 2681-31; Pet. App. 7a. Subsection (b) required USDA to timely process renewed administrative complaints, to investigate the claims therein, and to issue merits determinations—including the awarding of appropriate relief—after a hearing on the record. *Ibid.* Subsection (b) also directed USDA to issue decisions in such cases within 180 days if possible, and specified that USDA's denial of any such claim is subject to de novo judicial review in federal court. *Ibid.*

2. Days before the October 21, 2000 deadline, petitioners—a putative class of Hispanic farmers (the *Garcia* petitioners) and a putative class of female farmers (the *Love* petitioners)—filed separate actions in federal district court under, *inter alia*, ECOA, alleging that

USDA discriminated against them in a variety of lending programs from 1981 through 1996. Pet. App. 7a, 27a-28a. In so doing, petitioners elected to proceed under Section 741(a) rather than renewing their administrative complaints before the agency pursuant to Section 741(b). Although petitioners chose to forego the administrative review of their claims, petitioners also asserted claims under the APA that USDA failed properly to investigate their earlier administrative complaints of discrimination. *Id.* at 7a-8a, 28a. Petitioners in each case sought to proceed as a class action under Federal Rule of Civil Procedure 23.[1]

In separate rulings in *Love* and *Garcia*, the district court denied petitioners' motions for class certification. Pet. App. 128a-156a, 157a-173a. Petitioners filed interlocutory appeals pursuant to Federal Rule of Civil Procedure 23(f) and 28 U.S.C. 1292(b), and the court of appeals affirmed the denials of class certification in both cases. Pet. App. 51a-65a, 78a-89a. The court of appeals also affirmed the district court's dismissal of petitioners' claim under ECOA that USDA failed to investigate discrimination complaints, finding that such action does not

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[1] At roughly the same time that petitioners filed their ECOA claims in these cases, a putative class of Native-American farmers filed a separate ECOA action in district court alleging discriminatory conduct by USDA similar to the conduct alleged here. See *Keepseagle* v. *Veneman*, No. 99-3119, 2001 WL 34676944 (D.D.C. Dec. 12, 2001). The district court in *Keepseagle* certified a class action under Federal Rule of Civil Procedure 23(b)(2) on the ground that the failure-to-investigate claim asserted in that case presented a common issue among the class members. *Id.* at *12-*15. The court of appeals dismissed USDA's interlocutory appeal under Federal Rule of Civil Procedure 23(f) and refused to reach what it characterized as the "merits" question of whether the failure-to-investigate claim was cognizable under the APA. See *In re Veneman*, 309 F.3d 789, 793-796 (D.C. Cir. 2002).

qualify as a "credit transaction" under ECOA. *Id.* at 66a, 89a-91a. The court of appeals declined, however, to exercise jurisdiction over petitioners' appeal from the dismissal of their failure-to-investigate claims under the APA. Noting that "the class certification issues took most of the trial court's and the parties' attention," the court concluded that "this claim will benefit from further development in the district court." *Id.* at 66a; see *id.* at 91a.

On remand, the district court reconsidered whether petitioners' allegations that USDA had previously failed to investigate their discrimination complaints are cognizable under the APA, and held that they are not. Pet. App. 31a-36a. The court noted that "[t]he APA provides for judicial review only where plaintiffs have 'no other adequate remedy in a court.'" *Id.* at 31a (quoting 5 U.S.C. 704). Because the court found that "Congress has expressly addressed the exact injury of which plaintiffs complain, and provided a 'special' and 'adequate' remedy for their wrong," *ibid.* it concluded that plaintiffs were not permitted to seek review of that injury directly under the APA. *Id.* at 31a-36a. The court found that the remedy Congress provided in Section 741 is "plainly 'adequate,'" because it not only extended "all applicable periods of limitation for those prejudiced by agency inaction," but "also allowed any eligible complainant to 'seek a determination on the merits of the eligible complaint by the Department of Agriculture'—in other words, to take up her complaint again with the agency." *Id.* at 32a (quoting Section 741(b)). Because Congress provided twin avenues of relief—renewed administrative complaint or judicial action under ECOA—to remedy any injury caused by USDA's alleged failure to investigate complaints of discrimination, the court

held that 5 U.S.C. 704 precludes petitioners from asserting failure-to-investigate claims under the APA. Pet. App. 32a-36a.

3. With permission from the district court and the court of appeals, petitioners filed an interlocutory appeal pursuant to 28 U.S.C. 1292(b), and a unanimous panel of the court of appeals affirmed. Pet. App. 1a-19a. The court noted that the APA, through 5 U.S.C. 704, permits judicial review of "final agency action" that is not expressly made reviewable by statute only when "there is no other adequate remedy in a court." Pet. App. 9a (quoting 5 U.S.C. 704). Relying on this Court's holding in *Bowen* v. *Massachusetts*, 487 U.S. 879, 904 (1988), that 5 U.S.C. 704 precludes APA review of agency action when Congress has otherwise provided a "special and adequate review procedure," Pet. App. 9a, the court concluded that the remedy provided in Section 741 is sufficient to preclude APA review of petitioners' failure-to-investigate claims, *id.* at 9a-16a.

The court reasoned that, "[b]y extending the statute of limitations for administrative complaints and by providing for judicial review of USDA's determinations, Congress provided [petitioners] an adequate remedy in court within the meaning of the APA." Pet. App. 12a. The court noted that "there is clear and convincing evidence that in enacting Section 741 Congress did not intend for complainants who choose to proceed in the district court on their ECOA claims to pursue their failure-to-investigate claims under the APA simultaneously in the same lawsuit." *Id.* at 11a. The court explained that "Congress resurrected time-barred claims and gave such complainants two options: either file a complaint in the district court or renew their administrative complaint with the USDA with subsequent judicial review if

the USDA denied relief." *Ibid.* The court held that, because petitioners elected to proceed directly to district court under Section 741(a), 5 U.S.C. 704 precludes them from simultaneously pursuing an APA claim seeking "declaratory and injunctive relief that the USDA should have investigated their old, unrenewed administrative complaints." Pet. App. 12a. The court reasoned that allowing plaintiffs to proceed as petitioners wished "would effectively rewrite the statute that Congress specifically enacted in response to the USDA's failure to address discrimination complaints." *Id.* at 13a. The court observed that petitioners could have "renewed their administrative complaints pursuant to Section 741(b) and thereby attempted to obtain relief pursuant to the APA through the USDA's administrative process." *Ibid.* Had they chosen this option, they would also have been able to compel any agency action that was unreasonably delayed. *Id.* at 13a-14a. The court of appeals found that it was not free to rewrite Section 741 by eliminating the provision requiring "eligible complainants to make a choice between two remedial regimes." *Id.* at 14a.

The court also held that petitioners' APA claims would be independently barred even if they were correct that it was futile to pursue the available administrative avenue of relief because petitioners had an adequate statutory remedy in ECOA. Pet. App. 14a-18a. "Under the ECOA," the court explained, "to the extent [petitioners] can offer proof that the USDA discriminated against them in the administration of its credit programs, [petitioners] will be entitled to recover money damages and attorneys' fees, and, as appropriate, also injunctive and declaratory relief." *Id.* at 14a.

Such a remedy, the court concluded is "adequate to preclude a cause of action under the APA." *Ibid.*

ARGUMENT

The interlocutory decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. This Court's review is therefore not warranted.

1. Initially, the interlocutory posture of this case makes it unsuitable for further review at this time. See *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *VMI* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of certiorari). On remand, petitioners will be able to pursue their individual discrimination claims against USDA under ECOA and may well receive all of the relief to which each is entitled through that avenue of relief. If, when the district court issues a final order as to a particular petitioner's claims, that petitioner remains unsatisfied with her inability to pursue a failure-to-investigate claim directly under the APA, she may seek this Court's review of the ultimate disposition of her individual case at that time.

2. Petitioners' primary contention is that the court of appeals' interpretation of 5 U.S.C. 704 conflicts with this Court's interpretation of that provision in *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988). Petitioners are mistaken.

a. The Court in *Bowen* considered, *inter alia*, the interplay of two different provisions of the APA—5 U.S.C. 702 and 5 U.S.C. 704. 487 U.S. at 891, 901-908. As a general matter, the APA provides a cause of action to challenge agency action in federal district court, subject to certain restrictions. District courts have juris-

diction over such suits pursuant to 28 U.S.C. 1331, see *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 317 n.47 (1979); and 5 U.S.C. 702 expressly waives the United States' sovereign immunity to such suits to the extent they do not seek money damages, see *Darby* v. *Cisneros*, 509 U.S. 137, 152 (1993). Judicial review under Section 704 is limited, however to "final agency actions for which there is no other adequate remedy in a court." 5 U.S.C. 704. As this Court explained in *Bowen*, Section 704 "does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures." 487 U.S. at 903 (quoting Tom C. Clark, *Attorney General's Manual on the Administrative Procedure Act* 101 (1947)).

The Court in *Bowen* described the APA's place among other types of review of federal administrative action:

> At the time the APA was enacted, a number of statutes creating administrative agencies defined the specific procedures to be followed in reviewing a particular agency's action; for example, Federal Trade Commission and National Labor Relations Board orders were directly reviewable in the regional courts of appeals, and Interstate Commerce Commission orders were subject to review in specially constituted three-judge district courts. When Congress enacted the APA to provide a general authorization for review of agency action in the district courts, it did not intend that general grant of jurisdiction to duplicate the previously established special statutory procedures relating to specific agencies.

487 U.S. at 903 (footnotes omitted). Petitioners rest their entire argument (see Pet. 10-17) on the final phrase of that passage—"previously established special statutory procedures relating to specific agencies"—arguing that Section 704 precludes judicial review of agency action *only* when an adequate alternative remedy already existed at the time the APA was enacted. But the quoted passage merely describes the types of adequate alternative remedies Congress intended to be sufficient to preclude resort to the APA (remedies that by definition must have existed prior to the APA in order for Congress to have had them in mind) as a way of introducing the Court's discussion of why the alternative remedy that the United States argued was adequate in that case (*i.e.*, review in the Court of Claims) was not, in fact, adequate.

There is no basis for construing the Court's language in *Bowen* as imposing a temporal restriction on the types of alternative remedies that would preclude resort to the APA under Section 704. The opinion in *Bowen* makes clear that Congress's intent in enacting Section 704 was to authorize judicial review of final agency action where no other adequate remedy is available. 487 U.S. at 902-903. That intent remains the same regardless of whether the adequate alternative remedy in question in a particular case came into being before or after the APA was enacted. As petitioners note (see Pet. 12-17), the D.C. Circuit has an unbroken chain of precedent interpreting Section 704 and *Bowen* as preventing plaintiffs from seeking judicial review of agency action under the APA when the plaintiffs have an alternative adequate remedy. See, *e.g.*, *El Rio Santa Cruz Neighborhood Health Ctr.* v. *HHS*, 396 F.3d 1265, 1270 (2005); *National Wrestling Coaches Ass'n* v. *Depart-*

ment of Educ., 366 F.3d 930, 945-948 (2004); *Washington Legal Found.* v. *Alexander*, 984 F.2d 483, 486 (1993); *Women's Equity Action League* v. *Cavazos*, 906 F.2d 742, 750-751 (1990); *Council of & for the Blind* v. *Regan*, 709 F.2d 1521, 1531-1533 (1983) (en banc). In fact, petitioners do not cite a single case endorsing their view of *Bowen* or 5 U.S.C. 704.

b. Petitioners attempt (Pet. 14-15) to ground their proposed temporal restriction in 5 U.S.C. 559 (Section 12 of the APA as enacted, 79th Cong., ch. 324, 60 Stat. 244), which provides: "Subsequent statute may not be held to supersede or modify * * * chapter 7 [5 U.S.C. 701 *et seq.*] * * *, except to the extent that it does so expressly." See Pet. App. 174a-175a. Although petitioners do not spell out their argument in detail, presumably they mean to suggest that a statutory remedy enacted after the APA can never preclude a plaintiff from seeking review of agency action under the APA unless the statute explicitly states its intention to do so. But that reading of 5 U.S.C. 559 misunderstands its plain text.

Statutory remedies enacted after the APA preclude petitioners' use of the APA to seek review of administrative action when the remedies are "adequate" within the meaning of 5 U.S.C. 704. The fact that such an adequate remedy's enactment post-dates the APA's does not mean that the later-enacted remedy "supersede[s] or modif[ies]" Section 704 within the meaning of 5 U.S.C. 559. With or without the later-enacted remedy, Section 704 still requires that an alternative remedy be "adequate" in order to preclude the use of the APA. The relevant question as to such a post-APA remedy is the same as it was in *Bowen* as to the pre-APA remedy: is it "adequate" within the meaning of Section 704? Thus, the court of appeals' interpretation of the meaning of

5 U.S.C. 704 is perfectly consistent with this Court's decision in *Bowen*.[2]

3. Petitioners also argue (Pet. 18-26) that the court of appeals erred in holding that the remedies Congress provided in Section 741 are adequate and therefore preclude petitioners' filing of an APA action simultaneously with their ECOA actions. Petitioners do not contend that the court of appeals' decision on that issue directly conflicts with any decision of this Court or of any other court of appeals. Even if they could identify such a conflict, the court of appeals' decision would not warrant further review at this time because it is correct.

Petitioners do not dispute that Congress enacted Section 741 specifically to address the past deficiencies in USDA's investigation of discrimination complaints. Section 741 offers eligible farmers a choice of remedies: (1) they can pursue their claims that USDA discriminated against them in its lending programs directly under ECOA in federal district court, Section 741(a); or (2) they can resurrect their original complaint by filing a renewed administrative complaint with USDA, Section 741(b). Petitioners all opted for the first choice, filing the underlying actions in district court under ECOA.

Petitioners argue (Pet. 18-19) that ECOA is not an adequate remedy because, as both the district court and the court of appeals found, plaintiffs cannot pursue their failure-to-investigate claims under ECOA. But that argument misses the point. Petitioners *can* pursue their

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[2] In any event, because petitioners did not argue to the court of appeals that *Bowen* requires different treatment of alternative remedies enacted after the APA compared with remedies enacted prior to the APA, they waived that argument. See *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212-213 (1998).

discrimination-in-lending[3] claims in district court directly under ECOA, and do not contend that ECOA is not an adequate remedy for those grievances. Petitioners' claims of discrimination are at the heart of this dispute, and ECOA entitles prevailing parties to money damages and attorneys fees, as well as declaratory and injunctive relief. Pet. App. 14a. The court of appeals correctly held that petitioners' ability to sue USDA directly in federal court for discrimination in the administration of its lending programs is an adequate alternative remedy within the meaning of 5 U.S.C. 704.

Petitioners also argue (Pet. 21-26) that the alternative remedy provided in Section 741(b)—the ability to file a renewed administrative complaint with USDA, the resolution of which will be subject to de novo judicial review—is inadequate and, therefore, cannot preclude petitioners' filing suit directly under the APA to assert their failure-to-investigate claims. As an initial matter, petitioners do not even attempt to explain why they can only be made whole by pursuing failure-to-investigate claims that are separate and apart from their discrimination claims under ECOA. Petitioners' discrimination-in-lending claims form the basis of their cases and they do not dispute that ECOA is an adequate remedy for those claims.

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[3] Petitioners argue (Pet. 18-19) that the court of appeals' determination that ECOA is an adequate remedy for petitioners' claims is erroneous because some petitioners raise, as the court of appeals described them, "APA claims that the USDA discriminated in dispersing non-credit disaster benefits, which are not covered by Section 741." Pet. App. 19a. Because the district court remanded those claims for further proceedings in the district court, however, *ibid.*, they are not properly before this Court for further review.

Instead, petitioners argue (Pet. 22-25) that USDA's administrative complaint process—a process none of them opted to pursue—continues to be plagued by problems and inefficiencies. Even if that were true (which the government does not concede), it would not undermine the adequacy of petitioners' remedy under ECOA. The result of USDA's failure over two decades to investigate claims of discrimination in lending by the agency and its subunits was that farmers who believed they had suffered discrimination in the agency's programs had nowhere to turn to seek redress. Congress fixed that problem by retroactively extending the statute of limitations under ECOA for those farmers, and petitioners took advantage of that solution. The fact that Congress also provided an alternative revised administrative process—a process in which none of petitioners opted to participate—does not affect the adequacy of petitioners' renewed opportunity to file ECOA claims in district court.

4. Finally, petitioners contend (Pet. 26) that review by this Court is warranted because principles of fairness and equity demand that they be allowed to pursue the same remedies in the exact same procedural posture (*e.g.*, a class action) as the African-American farmers in *Pigford* and the Native-American farmers in *Keepseagle*. But the suitability of petitioners' claims for disposition as class actions was not before the court of appeals in this appeal and is not before this Court now. Petitioners appealed the district court's denial of motions to certify classes in a previous appeal, see Pet. App. 40a-67a, 68a-92a and chose not to seek certiorari review by this Court at that time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the Supreme Court of the United States

GUADALUPE L. GARCIA, JR., *ET AL.*,
Petitioners,

v.

THOMAS VILSACK, SECRETARY,
UNITED STATES DEPARTMENT OF AGRICULTURE,
Respondent.

ROSEMARY LOVE, *ET AL.*,
Petitioners,

v.

THOMAS VILSACK, SECRETARY,
UNITED STATES DEPARTMENT OF AGRICULTURE,
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STATEMENT

The petition explained that this Court's review is needed to address an important, recurring issue on which the D.C. Circuit has circumvented *Bowen v. Massachusetts*, 487 U.S. 879 (1988), in favor of its own contrary precedent. The D.C. Circuit's departure from *Bowen* is all the more pronounced because it also runs counter to Congress' repeated efforts to remedy the administrative lawlessness that petitioners' claims address. Let there be no mistake, it is undisputed that the Department of Agriculture ("USDA") has flouted legal norms for decades. The courts have now exacerbated that misconduct by drawing an irrational line that denies to Hispanic and women farmers the judicial forum Congress intended (and that the courts have afforded to African American and Native American farmers who challenged precisely the same agency wrongdoing). Accordingly, as detailed in the petition, the question presented in this case is significant and will have a powerful practical impact. Respondent's brief in opposition offers no supportable basis for denying review and, moreover, offers no defense whatsoever for the continuing unlawful conduct.

Having perpetrated one of the most odious episodes of governmental lawlessness in American history (Pet. App. 188a, 214a, 223a-224a) and having sabotaged Congress' attempt to rectify the pervasive lawlessness (Pet. App. 235a-237a), the "USDA" now seeks to prevent tens of thousands of Hispanic and women farmers from having their claims "resolved in an expeditious and just manner." (Pet. App. 253a)

In so doing, respondent seeks to obscure the inexorable link between petitioners' failure-to-investigate claims and the ability of tens of thousands of Hispanic and women farmers who are the victims of this unprecedented and admitted governmental lawlessness to have their claims resolved. (Opp. 6n.1, 16)

It is undisputed that petitioners' complaints were two of four virtually identical complaints filed in the district court on behalf of African American, Native American, Hispanic and women farmers. While African American and Native American farmers were granted class certification with respect to their claims of discrimination in both USDA's farm credit and non-credit farm benefit programs on the basis of USDA's admitted failure to investigate discrimination complaints, Hispanic and women farmers were denied class certification on virtually identical facts. (Pet. 6-7)

ARGUMENT

1. Respondent's assertion that the interlocutory posture of the case makes it unsuitable for further review is incorrect. The cases upon which respondent relies, *Brotherhood of Locomotive Firemen v. Bangor & Aroostook Railroad Co.*, 389 U.S. 327 (1967) (*per curiam*) and *VMI v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of cert.), are clearly distinguishable from the instant cases. In *Brotherhood of Locomotive Firemen*, this Court denied review of certain contempt orders because, the court of appeals, in remanding the case, directed the district court to consider whether there was in fact contempt and, if

so, whether it warranted any of the coercive fines originally ordered by the district court. 389 U.S. at 328. The case clearly was not ripe for review inasmuch as it was uncertain whether petitioner would ultimately be subject to any liability.

Similarly, in *VMI*, petitioner sought review of an order that had been vacated and remanded by the court of appeals. Justice Scalia observed that the denial of the petition was appropriate because there was no final judgment entered and, in remanding the case, the court of appeals had "expressly declined to rule on the 'specific remedial course that the [petitioner] should or must follow hereafter' and suggested permissible remedies other than compelling [VMI] to abandon its current admissions policy." 508 U.S. 946. In stark contrast, in the instant cases, denial of the petition effectively sounds the death knell to the claims of tens of thousands of Hispanic and women farmers who are the victims of USDA's admitted discrimination (Pet. 21-26) and sabotage of Congress' efforts to rectify that discrimination. (Pet. App. 235a-237a) Additionally, denial of the instant petition will extinguish the claims of untold numbers of Native American farmers who are victims of the same discrimination as petitioners because respondent is poised to move to decertify the Native American class should the instant petition be denied. (Opp. 6 n.1)

2. Respondent ignores the plain meaning of this Court's express holding in *Bowen*, 487 U.S. at 903, that "When Congress enacted the APA to provide a general authorization for review of agency action in the district courts, it did not intend that general grant of jurisdiction to duplicate the previously

established special statutory procedures relating to specific agencies." Accordingly, there is no merit to respondent's contention that "there is no basis for construing the Court's language in *Bowen* as imposing a temporal restriction on the types of alternative remedies that would preclude resort to the APA under Section 704." (Opp. 12) Such a temporal restriction is clearly evident from the Court's express language in *Bowen*.

Respondent also errs in asserting that "petitioners do not cite a single case endorsing their view of *Bowen* or 5 U.S.C. 704." (Opp. 13) The petition (at 10) makes clear this Court expressly reaffirmed the temporal restraint placed on the "adequate remedy in a court" language of APA 704 in *Bowen*, noting that "Congress intended by that provision *simply* to avoid duplicating previously established special statutory procedures for review of agency actions." *Darby v. Cisneros*, 509 U.S. 137, 146 (1993) (emphasis added); *see also Esch v. Yeuter*, 876 F.2d 936 (D.C. Cir. 1989) (Pet. 16-17) And, this Court left no doubt concerning "the previously established special statutory procedures relating to specific agencies." *Bowen*, 487 U.S. at 903. (Pet. 13-14)

Respondent simply ignores the express terms of this Court's holdings in *Bowen* and *Darby* and instead speculates concerning the supposed intent of Section 704. (Opp. 12-13) Unlike respondent's speculation, this Court's express temporal restraint on Section 704's "adequate remedy" language is wholly consistent with what the Court concluded to be the APA's "central purpose." As this Court has repeatedly made clear, "the [APA's] 'generous review

provisions' must be given a 'hospitable interpretation'" and that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should courts restrict access to judicial review." *Abbott Labs v. Gardner*, 387 U.S. 136, 140, 141 (1967). Indeed, *Bowen* invoked the temporal restraint imposed by Section 704 in explaining that "[t]he exception that was intended to avoid such duplication should not be construed to defeat *the central purpose of providing a broad spectrum of judicial review of agency action*," and "'that the [APA's] "generous review provisions" must be given a "hospitable" interpretation.'" *Bowen*, 487 U.S. at 903-04 (quoting *Abbott Labs*, 387 U.S. at 140-141) (emphasis added and footnotes omitted). Thus, despite respondent's assertion to the contrary (Opp. 13-14), the court of appeals' interpretation of 5 U.S.C. 704 is not only inconsistent with this Court's decision in *Bowen*, but inconsistent with the "central purpose" of the APA.

The temporal restriction on Section 704 is not only evident from the express terms of this Court's holdings in *Bowen* and *Darby*, it is also evident from a comparison of the plain language of Sections 10c and 12 of the APA. This Court held that, in enacting the APA, Congress intended to provide "a broad spectrum of judicial review of agency action." In doing so, Congress looked to review procedures that existed with respect to specific agencies at the time it enacted the APA and sought not to duplicate such review. With respect to subsequently enacted legislation, again in keeping with providing "a broad spectrum of review of agency action," Congress made clear that such legislation would not displace APA

review unless Congress explicitly stated its intention to do so in the legislation.[1] *See Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955) (quoting APA § 12). ("'[n]o subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly.").

3. Respondent persists in mischaracterizing petitioners' cases as involving only credit claims and arguing that petitioners' failure-to-investigate claims are barred because ECOA provides an adequate remedy for their credit discrimination claims. Respondent is incorrect. First, the argument rests entirely upon respondent's misreading of this Court's express holding in *Bowen*, and reaffirmed in *Darby*, that APA 704 precludes duplication of review procedures that were "previously established" at the time Congress enacted the APA.

Second, inasmuch as the court of appeals, as respondent noted (Opp. 6-7), held that the failure-to-investigate claims are not credit transactions covered by ECOA, a court exercising injunctive authority pursuant to ECOA could not require USDA to investigate complaints of discrimination in the administration of its credit programs. However, because USDA's refusal to investigate discrimination

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[1] Respondent's waiver argument (Opp. 14 n.2) is altogether erroneous. *See, e.g.*, *Garcia* Appellants' Opening Brief at 28-32 filed September 29, 2008; *Garcia* Appellant's Reply Brief at 7-8 filed November 12, 2008 and Appellants' Corrected Petition For Rehearings *En Banc* at 5 and n.5 filed June 8, 2009. *See Brewster v. Commissioner*, 607 F.2d 1369, 1373-74 (D.C. Cir. 1979).

in its credit programs violated its rules requiring it to investigate discrimination complaints, pursuit of the discrimination claim would not bar an APA claim based upon USDA's violation of its rules. *See McKenna v. Weinberger*, 729 F.2d 783, 791 (D.C. Cir. 1984) (holding that an agency's failure to follow its own regulations gives rise to a separate cause of action in addition to the underlying discrimination charge because "*the agency, whether its motive was legal or illegal, failed to conform to its own regulations.*") (emphasis added). It is a basic tenet of law that an agency must comply with its own regulations. *See, e.g., Morton v. Ruiz*, 415 U.S. 199, 235 (1974); *Esch*, 876 F.2d at 991 and n.163. Therefore, a discrimination claim and an APA claim may be pursued concurrently because the claims have independent bases. Moreover, ECOA could not possibly provide an adequate remedy, under any definition of the term, for USDA's refusal to investigate discrimination in the administration of its *non*-credit farm benefit programs. (Pet. 18-19)

4. Respondent's remaining arguments ignore the nightmarish administrative reality that strongly favors certiorari. In short, respondent contends that because petitioners did not avail themselves of the supposedly adequate alternative procedure in Section 741, petitioners are precluded from seeking injunctive relief with respect to USDA's continued refusal to investigate discrimination complaints of Hispanic and women farmers. (Opp. 14-16) Contrary to respondent's imagined scenario, the discrimination at issue is not merely a relic of a bygone era but it continues to this very day. Similarly, USDA's refusal to investigate

discrimination complaints that prompted Congress to enact Section 741 similarly persists. (Pet. App. 239a-252a, 260a-270a) There is no basis in law for respondent to contend that because petitioners did not undertake the futile act of pursuing an indisputably sabotaged and flawed process that they are now precluded from obtaining injunctive relief in the form of an order requiring respondent to conduct investigations and to implement proper procedures to insure that administrative complaints are properly investigated. (Pet. 25; Pet. App. 235-237a) Respondent has indisputably ignored an explicit congressional directive to do so. This Court's review is thus necessary to assure that respondent ceases its continued flouting of Congress' express intent.

CONCLUSION

The petition for a writ of certiorari should be granted.

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UNITED STATES DEPARTMENT OF AGRICULTURE,
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On Petition For A Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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15 U.S.C. §§1691 *et seq* .....

STATEMENT OF INTEREST

I, Paul Schiff Berman, am Dean and Foundation Professor of Law at the Sandra Day O'Connor College of Law at Arizona State University.[1] My interest in the case arises from having been a court-appointed amicus in a previous D.C. Circuit appeal raising the same issue. I continue to believe, as I did then, that the D.C. Circuit is severely misinterpreting U.S. Supreme Court precedent, and I file this brief purely from the perspective of one who supports just outcomes throughout the legal system.

SUMMARY OF ARGUMENT

Because the D.C. Circuit and its district courts have repeatedly misinterpreted U.S. Supreme Court precedent concerning the ability of litigants to seek judicial review under the Administrative Procedure Act, many potential meritorious claims have been denied even a hearing. Moreover, because of the nature of these cases, most if not all will arise in the D.C. Circuit, and U.S. Supreme Court review is therefore warranted at this time.

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[1] The parties have consented to the filing of this brief. Each party has been provided notice of my intent to file this *amicus* brief more than 10 days prior to this filing. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than myself and my employer, the Sandra Day O'Connor College of Law at Arizona State University, made a monetary contribution to the preparation or submission of this *amicus* brief.

ARGUMENT

In a series of decisions stretching back over 20 years, the D.C. Circuit and its district courts have repeatedly misinterpreted U.S. Supreme Court precedent concerning the ability of litigants to seek judicial review under the Administrative Procedure Act ("APA"), 5 U.S.C. § 704, when they are also bringing additional claims under other statutes. *See, e.g.*, Petitioners' Brief at 11-17. In particular, litigants bringing a discrimination claim against a government agency under the Equal Credit Opportunity Act, 15 U.S.C. §§1691 *et seq*, have been prevented from bringing a separate APA claim alleging arbitrary and capricious government action despite the fact that these are separate claims with distinctly different elements. As a result, many potentially meritorious APA claims have been denied even a hearing. Moreover, because of the nature of this issue, it is unlikely to arise in other circuits. Accordingly, Supreme Court review is warranted now.

At issue is 5 U.S.C. § 704, which provides judicial review of agency actions "for which there is no other adequate remedy in a court." In *Bowen v. Massachusetts,* 487 U.S. 879, 903 (1988), this Court made clear that this language is merely intended to block additional judicial remedies in situations where Congress has already enacted special administrative review provisions. . As the Court noted, at the time the APA was enacted a number of the statutes creating administrative agencies had already defined specific procedures to be followed in reviewing the particular agency's action. *Id.* For

example, "Federal Trade Commission and National Labor Relations Board orders were directly reviewable in the regional courts of appeals, and Interstate Commerce Commission orders were subject to review in specially constituted three-judge district courts." *Id.* Accordingly, "[w]hen Congress enacted the APA to provide a general authorization for review of agency action in the district courts, it did not intend that general grant of jurisdiction to duplicate the previously established special statutory procedures relating to specific agencies." *Id.* However, the Court warned that this exception was intended solely to avoid such duplication and "should not be construed to defeat the central purpose of providing a broad spectrum of judicial review of agency action." *Id.*

Despite this admonition, the D.C. Circuit and its district courts have prevented litigants from bringing both ECOA and APA claims in a single lawsuit. Correctly concluding that ECOA provides an adequate avenue of relief for lending discrimination claims,[2] the courts have ignored the fact that the litigants were also raising APA claims, which by their very nature turn on whether agency action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A) (2000). Such claims of arbitrary and capricious action may, of course, include discrimination, but it is clearly the case that

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[2] ECOA provides that "[i]t shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction. . . . on the basis of . . . sex or marital status. . .". 15 U.S.C. § 1691(a)(1) (2000).

an agency action might be arbitrary and capricious without being discriminatory. Thus, litigants could win on an APA claim without winning on an ECOA claim. Accordingly, it cannot be said that ECOA provides an adequate remedy.

One need only consider the types of claims raised by litigants in the farm lending cases at issue here to see just how separable the ECOA and APA claims are. Many of the allegations clearly implicate concerns about arbitrary government action that are distinct from discrimination. For example, litigants have alleged that the Farm Services Administration prevented entry into beneficial programs, provided incorrect information, failed to provide required services, and so forth. Such allegations encompass improper government action, regardless of whether these actions were motivated by discriminatory animus.

The principle articulated in these decisions is potentially broad indeed. Using the logic of the D.C. Circuit, any time one raises a cause of action under a statute, all accompanying APA claims are therefore preempted. Such a precedent, if allowed to stand, would have extremely far-reaching consequences and would dramatically narrow the scope of relief afforded by the APA. Such restrictions on APA claims would be directly counter to this Court's statement in *Bowen* that the central purpose of the APA was to allow a broad spectrum of relief with regard to agency action. Further, because the D.C. Circuit is the principal forum for bringing APA claims, a circuit split is far less likely to arise, and this Court's review is warranted now to clarify the

proper meaning of *Bowen* and the proper scope of the APA.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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